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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1173

HARRY R. HUGHES AND JOHN-CLARENCE NORTH,
Petitioners,

v.

W. F. STRONG, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland entered in the above-entitled case on January 11, 1966, prior to opinion, and as modified by a further Order entered on March 2, 1966 at the time of the filing of the majority and dissenting opinions.*

* Additional parties respondent (who were plaintiffs in the original suit) are Newton I. Steers, Francis J. Fagan, John T. Doherty, Andrew M. Bristow, Samuel Hopkins, and the Maryland Committee for Fair Representation, an unincorporated association. The remaining Respondents are the state officials named as defendants in the suit as filed, namely, the Governor, Secretary of State, Comptroller, Attorney General, Treasurer of Maryland and the Clerk of the Maryland Court of Appeals, individually and as members of the State Board of Canvassers, and the members of the Board of Election Supervisors of Anne Arundel County.

CITATIONS TO OPINIONS BELOW

The opinion of the Circuit Court for Anne Arundel County (R. 288) is unreported and is printed in Appendix B, p. 23a. The majority and dissenting opinions in the Court of Appeals of Maryland (R. 308, 329) printed in Appendix B, pp. 38a, 55a, are reported in 241 Md. 471, ... A. 2d .....

JURISDICTION

The original judgment of the Court of Appeals of Maryland was entered on January 11, 1966. Appendix B, p. 37a. No reargument has been sought. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3) since the validity of a state statute on grounds of repugnance to the Constitution of the United States is drawn in question. The validity of the statute in question, Md. Acts, 1965 Spec. Sess., Ch. 3, under the Equal Protection Clause of the Fourteenth Amendment was first drawn in question by the answer filed by the plaintiffs on November 3, 1965, to the state officials' petition for final decree (R. 249). The constitutionality of Ch. 3 has been the sole issue in these proceedings.

QUESTIONS PRESENTED

1. Whether a plan of reapportionment which establishes a large Senate in a state with an unusually small number of counties, validly affords "some independent representation to political subdivisions" where population and local subdivisions are the sole bases of apportionment, county government and "local legislation directed only to the concerns of particular political subdivisions" are of greater importance than in any other state, and the populous areas of the state are accorded substantially more than a 60% constitutional majority of seats in the Senate and three-fourths of the seats in the House of Delegates.

2. Whether a legislative apportionment plan which more than trebles the number of representatives of populous areas, moves more than three-fourths of the way toward a strict population standard, and affords populous areas 64% of one house and 75% of the other is valid for the 1966 election as a transitional plan where measures designed to alleviate the need for local legislation and county representation have been promptly proposed by the legislature and the necessary ratification processes to bring these changes into effect will require two to three years to complete and where permanent reapportionment cannot take place without constitutional amendment.

STATUTES INVOLVED

The statutory provisions involved are Md. Acts, 1965 Spec. Sess., Chs. 2 and 3. Ch. 3 by its terms and as construed by all parties to this litigation, and in all opinions below, is the legislature's preferred plan and will supplant Ch. 2 if its validity is upheld. The statutes are printed in Appendix A, pp. 1a, 12a.

STATEMENT

On August 12, 1960, the present lawsuit was instituted. With respect to the Senate, it sought an increase in that 29 member body by adding 14 new senators for urban and suburban areas for a total of 43. Each county would retain at least one senator (R. 234). During the ensuing two years, Respondent Maryland Committee for Fair Representation assisted in the defeat of several reapportionment plans, fearing their adoption "could moot a lawsuit." (Hanson, *Fair Representation Comes to Maryland* (Eagleton Institute: Cases in Practical Politics No. 35), McGraw Hill Book Co., New York 1964, p. 3). After *Baker v. Carr*, 369 U.S. 186 and *Maryland Committee v. Tawes*, 228 Md. 412, 180

A. 2d 656 (1962), the trial court on May 24, 1962, held the House of Delegates to be unconstitutionally apportioned (R. 170). On May 31, 1962, legislation was enacted allocating 19 additional seats in the House of Delegates to the suburban counties, Md. Code (1965 Repl. vol.), Art. 40, Sec. 42.

In July of 1962, a new gubernatorial commission on reapportionment was appointed, which included plaintiff Samuel D. Hopkins, and Professor Royce Hanson, president of the plaintiff Maryland Committee for Fair Representation. In September of 1962, the Maryland Court of Appeals, sustained the apportionment of the 29 member Senate. *Maryland Committee v. Tawes*, 229 Md. 406, 184 A. 2d 715 (1962). Later in the same month, the Governor's Commission, by unanimous vote, Professor Hanson and Mr. Hopkins joining, voted to defer further action pending this court's decision in the case.

In January 1964, the Governor's Commission filed its report (Stipulation Exhibit No. 7). The majority recommended certain changes only in the House of Delegates. Professor Hanson, Mr. Hopkins, and three other commission members, Dean Roger Howell of the University of Maryland Law School, Walter J. Bierwagen, representing the Maryland AFL-CIO, and Helen L. Koss, second vice-president of the Maryland League of Women Voters, dissented. Their report (Appendix C, p. 80a) was separately concurred in by Furman L. Templeton, President of the Baltimore Urban League. The dissent took the majority to task for its "unnecessary haste" in presenting a report prior to the decision of this Court (Appendix C, p. 80a). It endorsed "the guarantee of minimum representation for each county" based on the state's practice of local legislation (Appendix C, p. 92a). The minority report stated:

> We recommend that the Senate contain 47 members apportioned on the basis of population, except that every county and the City should be guaranteed one Senator, whatever its population * * *

In July, 1964, *Maryland Committee v. Tawes*, 377 U.S. 656 was decided. Subsequently the Legislative Council conducted hearings on reapportionment and on May 18, 1965, was advised by the Attorney General that: "[i]t would be fatal and unrealistic if you do not give the major metropolitan areas not only a just and fair majority, but also a working majority. He added that 64% certainly would be a working majority." Maryland Legislative Council, *Report to the General Assembly of 1966*, pp. 227-28. In formal opinions dated May 28, 1965, and September 21, 1965, the Attorney General retracted this view on an analysis of lower court decisions in other jurisdictions.

Against this background, the subject act providing for a 53 man senate and preserving one senator from each county was enacted and signed by the Governor on October 27, 1965. The bill was supported by senators from the 1st, 2nd, 3rd, 5th and 6th Districts of Baltimore City, and Baltimore and Anne Arundel Counties. In the House of Delegates the bill was supported by 24 delegates from the five populous subdivisions, including almost all of the Anne Arundel and Baltimore County delegates and nearly half of those from Montgomery County and the 4th District of Baltimore City. The act apportions senators among the counties and Baltimore City according to the mathematical method of equal proportions utilized in apportionment among the states of the United States House of Representatives, save that, in order to avoid redistricting Baltimore City's six districts, and the resultant danger of gerrymandering, two seats which would be awarded to Baltimore City, which has in both relative and absolute terms a de-

clining population, are instead awarded to Montgomery and Prince George's Counties, the two fastest growing subdivisions in the state. Ch. 3 provides for a House of 142 members also apportioned among the subdivisions on the basis of the equal proportions method.

At the same session of the legislature, an alternate plan, Ch. 2 was also enacted (Appendix A, p. 12a). This plan likewise provides for a 142 member House, districted and apportioned on the same basis as Ch. 3. It provides for a 43 member senate running from artificial districts created by combining up to 5 counties.

Following the legislative session, the Attorney General petitioned the Trial Court to dismiss the original complaint on the ground of compliance with this Court's mandate by virtue of the enactment of the two statutes (R. 242). Respondents, plaintiffs below, by their answer, asserted that the Senate features of the preferred plan, Ch. 3, violated the Equal Protection Clause of the Fourteenth Amendment.[1]

Since the Attorney General of Maryland had rendered an opinion that the preferred plan was invalid and consequently appeared below adversely to it, Petitioners here, the legislative sponsors of the plan, intervened as defendants.[2]

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[1] This was the sole issue in all litigation below. The Maryland Constitution contains no equal protection clause. No challenge was made to the alternate plan or to the House provisions of either bill by any of the parties. All other issues raised in Respondents' Answer were expressly abandoned at a pre-trial conference.

[2] See *Honsey v. Donovan*, 236 F. Supp. 8, 10 (D. Minn. 1965); *Silver v. Jordan*, 241 F. Supp. 576, 579 (S.D. Cal. 1965) holding state senators entitled to intervention as of right in reapportionment litigation. Cf. *Reynolds v. Sims*, 377 U.S. at 548; *Lucas v. Colorado General Assembly*, 377 U.S. at 716.

The Circuit Court for Anne Arundel County delivered an opinion on December 29, 1965 (Appendix B, p. 23a) holding the Senate provisions of Ch. 3 invalid and upholding the Senate provisions of Ch. 2 and the House provisions of both Acts. The court also retained jurisdiction until June 1, 1966. An appeal was taken to the Court of Appeals of Maryland which on January 11, 1966, one day after argument, handed down a per curiam order (Appendix B, p. 37a) affirming the judgment. On March 2, 1966 the Court of Appeals, dividing 5 to 2, filed its opinions. The court added to its prior order a direction "that the trial court retain jurisdiction at least until after the 1966 General Elections."[3] The majority opinion impliedly adopts the sort of rigid mathematical standard repudiated by this Court in *Roman v. Sincock*, 377 U.S. at 710 whereas the dissenting opinion relied heavily on an analysis of this language from *Reynolds v. Sims*, 377 U.S. 533, 580-81:

> Local governmental entities are frequently charged with various responsibilities incident to the operation of state government. In many states much of the legislature's activity involves the enactment of so-called

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[3] It is thus doubly plain that this petition involves a subsisting case and controversy, and that the jurisdiction of this Court ultimately to decide federal constitutional questions is not defeated (assuming, contrary to fact, that it otherwise could be) by the Maryland Legislature's direction in Sec. 4 of Ch. 3 that Ch. 2 should be ineffective "in the event this act shall be declared valid by the Court of Appeals of Maryland." See Hart & Wechsler, *The Federal Courts and the Federal System* (1953), 123; *So. Pacific Terminal Co. v. I.C.C.*, 219 U.S. 498 (1911); *Ford Motor Co. v. U. S.*, 335 U.S. 303, 313 (1948). Ch. 3 was enacted after Ch. 2, and the language in Sec. 4 conditions the operation only of Ch. 2 not of Ch. 3. As acknowledged by Respondents below, Sec. 4 does nothing more than restate the common law rule that where statutes passed at the same session of the General Assembly "are irreconcilably inconsistent, the latest in point of time will prevail." *Elgin v. Capitol Greyhound Lines*, 192 Md. 303, 317, 64 A. 2d 284, 291, aff'd, 339 U.S. 542 (1952). A mandate from the Court of Appeals sustaining Ch. 3 after a decision by this Court would plainly satisfy the act.

local legislation, directed only to the concerns of particular political subdivisions. And a state may legitimately desire to construct districts on political subdivision lines to deter the possibilities of gerrymandering. Carried too far, a scheme of giving at least one seat in one house to each political subdivision (for example, to each county), could easily result, *in many states,* in a *total subversion* of the equal population principle in that legislative body. This would be especially true in a state *where the number of counties is large and many of them are sparsely populated,* and the number of seats in the legislative body being apportioned *does not significantly exceed the number of counties.* (377 U.S. at 581) (E.S.)

REASONS FOR GRANTING THE WRIT

1. The instant matter presents a question of importance for all states in which the number of subdivisions is not large.

Fourteen American states have fewer than 25 counties, as follows: Delaware 3, Rhode Island 5, Hawaii 5, Connecticut 8, New Hampshire 10, Arizona 14, Massachusetts 14, Vermont 14, Maine 16, Nevada 17, New Jersey 21, Wyoming 23, Maryland 24, Alaska 24. These states have it within their capacity to create legislative houses in which "the number of seats in the legislative body being apportioned * * * significantly exceed(s) the number of counties," and in which populous areas would not be deprived of effective majority rule. Many of them have done so, and their courts are in disarray as to the constitutional validity of the results. In Massachusetts, a court-appointed commission framed a reapportionment plan, placed in force by the legislature, containing disparities of up to 5 to 1 between the largest and smallest districts. See Mass. Gen. Laws 1963, c. 666, *White v. Denman,* 34 F.R.D. 252 (D. Mass. 1963), appeal dismissed 379 U.S. 28 (1964). In New

Jersey (*Jackman v. Bodine*, 44 N.J. 414, 209 A. 2d 825 (1965) and 44 N.J. 453, 205 A. 2d 713 (1964)) and Wyoming (*Schaefer v. Thomson*, 240 F. Supp. 247 (D. Wyo. 1964)), plans containing disparities considerably in excess of 2½ to 1 between largest and smallest districts have been unanimously upheld. In Vermont (*Buckley v. Hoff*, 234 F. Supp. 191 (D. Vt. 1964)) and Arizona (*Klahr v. Goddard*, ... F. Supp. .... (D. Ariz. 1966)), plans with disparities of 5 to 1 in the first case and 7 to 1 in the second have been invalidated. In the Vermont case, the court stressed the "unimportance" of counties in that state. In the Arizona case the court split 2 to 1. The above cases, taken together with the sharp division in the Maryland case, indicate that great uncertainty exists as to the proper interpretation of the "local subdivisions" qualification in *Reynolds*. Similar issues may arise in Alaska, (see Alaska Const., Art. VI) and Maine (see Me. Const., Art. IV, pt. 2, §1, Me. Sess. Laws 1961, c. 120), among other jurisdictions.

2. The decision below would seem clearly erroneous in view of the above-quoted language in this Court's opinion in *Reynolds*. This Court made clear that independent representation for local subdivisions was permissible in "either or *both*" (377 U.S. at 579) or "*at least* one" (377 U.S. at 580-81) of the houses of a state legislature (emphasis supplied). This Court by stating that "in many states" (377 U.S. at 581) this would not be permissible, made clear its belief ~~that in~~ at least some states it would be. The criteria advanced for identifying the states in which some independent representation for subdivisions was allowable were as follows:

a) that population not be "totally subverted" (377 U.S. at 581) or "submerged" (377 U.S. at 581), and that "a majority of the people of a state should elect a

majority of that state's legislators" (377 U.S. at 565). That criterion is met by the subject plan which gives a full 64% of the Senate to "five most populous subdivisions of Maryland — the counties of Anne Arundel, Baltimore, Montgomery and Prince George's and the City of Baltimore", identified and referred to in *Maryland Committee v. Tawes*, 377 U.S. 656, 664. That is not only a majority, but it exceeds the constitutional three-fifths majority required to propose amendments to the Maryland Constitution (Md. Const. Art. XIV, Sec. 1), to enact emergency legislation (Art. XVI, Sec. 2), and to override a veto by the Governor (Art. II, Sec. 17).

Purely mathematical standards have been rejected in determining whether votes are "in a substantial fashion diluted" (377 U.S. at 568). See *Roman v. Sincock*, 377 U.S. at 710. The limitations of two frequently used mathematical standards, the "theoretical majority" and "argument from extremes" are documented in Schubert and Press, *Measuring Malapportionment*, 58 Am. Pol. Sci. Rev. 302 (1964); see also Clem, *Measuring Legislative Malapportionment*, 7 Midwest Journal of Political Science 125 (1963). Under the "Index of Voting Power," suggested in the latter article, the Maryland subdivisions with 75% of the population have fully 70% voting power under the subject plan (Appendix C, p. 77a). The Clem approach seems logical in light of this Court's insistence that the two houses of the legislature be viewed together.

Moreover, as Table 3 in Appendix D, p. 100a, makes clear, all but eight counties would be entitled to one Senator in a 53 man Senate, apportioned according to the recognized 'major fractions' method, and these eight counties have a combined population which would

entitle them to three senators. Thus, according to the analysis utilized in *Jackman v. Bodine,* 44 N.J. 414, 209 A. 2d 825 (1965), only five senators or 9% would be required to be apportioned differently on a strict population basis. If full ideal ratios, in lieu of major fractions are used, the 15 counties lacking a full ratio have a combined population entitling them to 8 seats. Thus only seven seats would have to be apportioned differently on a full ratio basis and the 53 man senate would be 87% on the basis of population.

The focus of any mathematical approach should be on under rather than over representation. Comment, *A Comprehensive Survey of Redistricting or Reapportionment Law.* 48 Marquette L. Rev. 516, 520-21 (1965); Hanson, *Courts in the Thicket,* 12 Amer. U.L. Rev. 51, 77-78 (1963); White and Thomas, *Urban and Rural Representation and State Legislature Apportionment.* 17 Western Pol. Q. 724, 728 (1964). None of the urban or suburban districts and only one rural district are underrepresented by the 50% suggested as the maximum allowable underrepresentation in *Drew v. Scranton,* 229 F. Supp. 310, 327-28 (D. Pa. 1964), 379 U.S. 40 (1964) and *Sincock v. Roman,* 215 F. Supp. 169, 190 (D. Del. 1963), and the underrepresentation is far less than that allowed by the British Boundary Commissioners in respect to the larger British constituencies. See note 10, *infra.*

Application of the method and standard enunciated in White and Thomas, *supra,* makes plain that residents of urban areas are not prejudicially underrepresented. The writers suggest that in order for a plan to be sustainable, the weight of urban votes as determined by application of their formula should be no less than .90 in the more popular house and .75 in the house

apportioned partly on the basis of subdivisions. The old Maryland legislature plan invalidated in *Maryland Committee v. Tawes,* yielded indices of .79 for the House and .60 for the Senate, and gave rural areas an artificial majority in the Senate. The urban indices for the subject plan, by contrast, are .993 for the House and .866 for the Senate, figures which far more than meet the White-Thomas standard for a sustainable plan.

Mathematical approaches may be of significance in evaluating reapportionment plans for which there is no real local subdivisions justification, since such approaches then evidence that a factor other than the two permissible ones — population and local subdivisions — must have been used. However, where, as here, there is a most substantial local subdivisions justification, the standard is that population not be "submerged," As shown above, it is submitted this standard is met by the instant plan.

b) that the plan be based on "legitimate considerations incident to the effectuation of a rational state policy" (377 U.S. at 579). This criterion is met by the present plan, unlike all the plans hitherto involved in cases to which this Court has given consideration. The sole bases of apportionment here are population and minimum representation for political subdivisions. This case does not involve representation on the basis of square miles, cf. *Marshall v. Hare,* 378 U.S. 561 (1964), or arbitrary discrimination against specific urban areas, cf. *Davis v. Mann,* 377 U.S. 678 (1964); or use of a complex formula or artificial districts which heavily disenfranchise urban areas as such, cf. *W.M.C.A. v. Lomenzo,* 377 U.S. 633 (1964); *Lucas v. Colo. Genl. Assembly,* 377 U.S. 713 (1964); or arbitrary districts

frozen into the state constitution at an earlier time, cf. *Roman v. Sincock*, 377 U.S. 695 (1964); or equal representation of political subdivisions on the basis of the so-called 'federal analogy', cf. *Maryland Committee v. Tawes*, 377 U.S. 656 (1964); or use of minimum representation in states with large numbers of counties in which only a small fraction of seats were awarded on a population basis, cf. *Reynolds v. Sims*, 377 U.S. 533 (1964); *Swann v. Adams*, 377 U.S. 553 (1964); and *Anderson v. Harris*, 382 U.S. 894 (1965). Rather it involves use of a rational formula, giving heavily predominant weight to population, designed to meet pressing needs arising from the structure of government in a state. The President of the Respondent committee has noted that this sort of justification for departures from a population standard was not argued in any of the cases before the Supreme Court. See Hanson, *The Political Thicket* (Prentice-Hall, Inc., 1966), 113. The decisions in *Reynolds* and its companion cases invalidated various invidious classifications devised by the states. They did not purport to bar the states from choosing among reasonable means of classification, nor did they impair the traditional rule that the 14th Amendment's "function is negative, not affirmative, and it carries no mandate for particular measures of reform." *Ownbey v. Morgan*, 256 U.S. 94, 112 (1921); *Baker v. Carr*, 369 U.S. at 244, 245 (Douglas, J. concurring).

c) that the number of political subdivisions in the state not be "large" (377 U.S. at 581). Maryland has only 24 political subdivisions — fewer than all but 12 states (Appendix D, p. 98a). Moreover nearly all the states with fewer counties are New England and Western states in which county government is rela-

tively unimportant. See *Liggett Co. v. Lee*, 288 U.S. 517, 581 (Cardozo, J., concurring); 1 Bryce, *American Commonwealth* (2d ed.), 570-71.

d) that the state not have "many sparsely populated subdivisions" (377 U.S. at 581). In Maryland, the smallest subdivision — Kent County — has a substantial population — 15,481. Maryland has no small counties with a few hundred or a few thousand persons. Art. XIII, Sec. 1 of the Maryland Constitution of 1867, forbidding creation of new counties with less than 400 square miles, effectively prevented proliferation of small counties. See Maryland Geological Survey, *The Counties of Maryland: Their Origin, Boundaries and Election Districts* (1907), at 426. In only five American states with county government — Delaware, Maine, New Hampshire, New Jersey, and Rhode Island — does the most sparsely populated county have more persons than Kent County.

e) that the "number of seats in the legislative body being apportioned * * * significantly exceed the number of counties" (377 U.S. at 581). This criterion is met by a 53 man Maryland Senate. The ratio of seats to subdivisions is 2.2 to 1. If the suggestion in *Reynolds v. Sims*, 377 U.S. at 579, that at least some states would be able to afford independent representation to subdivisions in "both" houses of their state legislature is not to be rendered a dead letter, the subject plan should be upheld. In only five states with county government — Rhode Island, Delaware, Hawaii, Massachusetts, and New Hampshire, did the ratio of seats in the upper house to subdivisions as of June, 1964, exceed that in Maryland, and in all these states county government is relatively unimportant (Appendix D, p. 99a).

f) that "local governmental entities * * * (be) charged with various responsibilities incident to the operation of state government." In Maryland, counties are of great and perhaps unequalled importance as administrative units. Eleven of the present counties were in existence as of 1695. Maryland Geological Survey, *supra,* 429-572. Local health services, jails, libraries, real property assessments, soil conservation programs, the court system and prosecutors' offices are organized on a county basis. See *Maryland Manual* (1961-62), pp. 69, 99, 116, 347 ff. Seventeen of the 23 counties maintain, construct, and reconstruct their own road systems. Education, the most important function of state government, is organized entirely on a county basis. Maryland has 24 county school boards and not a single independent school district, the state retaining only limited visitorial powers. Only four other states, Hawaii, Rhode Island, Virginia, and North Carolina have no independent school districts. See Andrews, *History of Maryland* (1929), 638-39; Anderson, et al., *Government in the Fifty States* (Rev. ed. 1960), 24-5; U.S. Census of Governments, Vol. 1, No. 1, Table 1, p. 14 (1957). On the other hand, municipal (town) government outside of Baltimore City has never developed beyond a rudimentary state. The state's largest county, Baltimore County, has not a single incorporated municipality. The five largest communities in the state outside of Baltimore City are not incorporated municipalities. Maryland ranks only 48th among 51 American jurisdictions in the number of local governments per 100,000 inhabitants. See Spencer, *Contemporary Local Government in Maryland* (1965) p. 3. These facts render nugatory as to Maryland, the arguments against county representa-

tion put forward by advocates of a strict mathematical formula, e.g. "it is difficult to conceive that (the county) is inherently more significant than cities, villages, or even special purpose districts. School districts, for example, probably touch political emotions and the voters' pocketbooks more than any other body with governmental authority." McKay, *Reapportionment* (1965), p. 253. In Maryland, the county and local governments account for about 50% of the revenues and about 70% of the combined expenditures of government. If highway expenditures are left aside, 75% of government expenditures are made below the state level. *Interim Report of the Maryland Commission on State and County Finance* (1965), p. 2. By this quantitative standard Maryland counties are more important in relation to the state government than are the states in relation to the federal government. Their separate representation in directly elected legislative bodies is a felt need, reflected in every legislative apportionment since 1654. Michener, *The History of Legislative Apportionment in Maryland*, 25 Md. L. Rev. 1 (1965); *Maryland Committee v. Tawes*, 228 Md. 412, 434, n. 11.

g) that "much of the legislature's activity involves the enactment of so-called local legislation, directed only to the concerns of particular political subdivisions." This criterion is met in Maryland to an extent unequalled in the nation. "Maryland seems to be the only State in the Union having a published code of public local laws." Maryland Legislative Council: *Local Government: A Comparative Study*, Research Report No. 23 (September 1944), p. 21. In the 1963 session of the Legislature 629 local bills were introduced, including 219 Senate bills. Bell and Spencer, *The Legislative Process in Maryland* (1963 ed.) p. 87.

As noted by the late Professor V. O. Key, former Professor of Government at Harvard and former president of the American Political Science Association in his 1940 report to the Legislative Council, *The Problem of Local Legislation in Maryland,* each local bill and each of the numerous amendments thereto must have necessitated the same number of conferences with county commissioners and constituents. The Maryland practice in respect to local legislation is unique in that, as this court noted in sustaining its validity in *Salsburg v. Maryland,* 346 U.S. 545 (1954), and *McGowan v. Maryland,* 366 U.S. 420, 427, 537 (1961), each county delegation serves as a miniature legislature for each county. The holding of the *Salsburg* and *McGowan* cases was reaffirmed in *So. Carolina v. Katzenbach,* 34 L.W. 4207, 4214 (decided March 7, 1966). "Every one of the other forty-seven states has one or more standing committees to which the local bills of *all* counties may be referred." Maryland Legislative Council, Research Report No. 23, *supra,* at 17. All students of the system recognize that its impact on present Maryland law makes it impossible to abolish the system overnight. See Key, *supra,* p. 1 ff. and Spencer, *supra,* p. 30. All students of reapportionment in Maryland, including the President of the respondent committee, have recognized the need for maintaining separate county representation in both houses, at least for a transitional period. See the Minority Report of the Governor's Commission on Reapportionment of the General Assembly (1964), p. 29 (Appendix C, p. 93a); Dixon, *Apportionment Standards and Judicial Power,* 38 Notre Dame Lawyer 367, 391 (1963); League of Women Voters of Maryland. Publication No. 072 (1960), p. 2. Spencer, *supra,* p. 26 ff.

It is thus plain that all the criteria enunciated in *Reynolds v. Sims* for allowing independent representation to local subdivisions have been more than met in Maryland. Just as this Court has given vitality to the language of *Reynolds* indicating flexibility in the formation of multi-member districts, so should this Court give vitality to the "local subdivisions" qualification by reviewing the erroneously restrictive interpretation of the qualification made by the Court of Appeals of Maryland. See *Fortson v. Dorsey*, 379 U.S. 433 (1965); *Boineau v. Thornton*, 379 U.S. 15 (1965); *Burnette v. Davis*, 382 U.S. 42 (1965); *Harrison v. Schaefer*, ... U.S. ..... (1966); *Yancey v. Faubus*, ... U.S. ..... (1966).

3. The need for orderly development of the law requires that the Court give further plenary consideration to reapportionment problems.

All commentators on the July, 1964, reapportionment decisions have recognized that these decisions represent merely the "first round" of reapportionment litigation, and that renewed consideration by the Court will be necessary and appropriate in order to clarify the language about "local subdivisions." Thus the President of the American Political Science Association has pointed to the "local subdivisions" language and has noted that "the Court's one-man one-vote rule may not be as rigorous as it sounds. Chief Justice Warren's opinion in *Reynolds v. Sims* specifically disclaimed the intention 'to spell out any precise constitutional tests.'" Pritchett, *Equal Protection and the Urban Majority*, 57 Am. Pol. Sci. Rev. 869, 872 (1964). The Committee on Federal Legislation of the Association of the Bar of the City of New York, in opposing a constitutional amendment to overturn the *Reynolds* decision, has urged "allowing time for development of doctrine * * *. The

only factor expressly mentioned by the Court as justifying departure from equal population districts was the recognition of a state's political subdivisions in view of their place in state governmental administration. What variations will be permitted from the equal-population principle to take account of particular circumstances and whether such variations will satisfy some of the objections to the decisions remains to be seen, but the Court appears to have left the door open."[4] Professor Robert B. McKay observed: "The Supreme Court made it clear in the original decisions that there is considerable room for variation of formula depending, for example, on the governmental role played by local political subdivisions in the various states. * * * (W)e haven't had time to work out these things. The Supreme Court, it seems to me, has a great deal of good sense about problems of this character and they work them out over a period of time, and they will be responsive to the real needs."[5] Former Attorney General Robert F. Kennedy stated at the same hearings: "The Court said it would permit 'some deviations from the equal population principle' based on legitimate considerations incident to the effectuation of a rational State policy. *The content of that exception deserves to be worked out on a case-by-case basis.*"[6] (Emphasis added.)

Dean Jefferson Fordham of the University of Pennsylvania Law School observed that "(the court) has said, however, that in using local units of government as representative districts, a state may depart to a limited extent, from the one-man, one-vote principle. In keeping with the

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[4] *Reapportionment of State Legislatures.* Hearings before the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee, 89th Congress, 1st Session (1965), p. 251.

[5] Id., pp. 436, 443.

[6] Id. at p. 776.

realities of the local government configuration, it is reasonable to expect that there will be further extrapolation in cases yet to be decided."[7] Former Solicitor General J. Lee Rankin has noted that "the court was very careful to recognize that we did have fifty different states with numerous different problems in this area, and that a good-faith attempt to try to reach the problem on the basis of one man, one vote, and make adjustments for special needs of a state would be recognized as something reasonable under our constitution and its requirements."[8]

Perhaps even more significant as indicating the general understanding of this Court's decision in *Reynolds v. Sims* and its probable and appropriate future course is the following colloquy between Mr. R. Peter Straus, the plaintiff in *W.M.C.A. v. Lomenzo*, 377 U.S. 633 (1964), and the Chairman of the Subcommittee on Constitutional Amendments, Senator Tydings:

> Senator Tydings: You mean you could see logic to the present apportionment plan of the Maryland State Senate which has been approved by the House but not by the Senate which increases the size of the Maryland Senate from 29 senators to 53 senators, thereby providing that every small county which now has a senator still has a senator, but the great tremendous suburban areas of our state in which 78 percent of the people reside would have an equal voice or an equal share of the vote and procedures in that particular house. Is that what you are saying?
>
> Mr. Straus: It seems to me logical, yes.[9]

4. Strong reasons in policy exist for allowing the states reasonable leeway in according representation to local subdivisions.

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[7] Id. at p. 930.
[8] Id. at pp. 873-74.
[9] Id. at p. 638.

This Court has recognized that "more flexibility may * * * be constitutionally permissible with respect to state legislative apportionment than in congressional districting" (377 U.S. at 578). Such greater flexibility is justified by the greater number of seats to be distributed in state legislatures. Also, it is to be recollected that "the powers of the general government are limited, and embrace only such objects as are of a national character. * * * The knowledge required of a national representative is, therefore, necessarily of a more large and comprehensive character than that of a mere state representative. Minute information, and a thorough knowledge of local interests, personal opinions and private feelings are far more important to the latter than the former." *Story on the Constitution*, Sec. 659 (2d Ed. 1851). Effective service as a state senator requires long knowledge of local and, more particularly, county, institutions and officials — knowledge not as likely to be possessed when a senator must represent three or four counties other than that in which he resides and with whose politics he has long been familiar. Considerations of this nature seem to have induced this Court to refrain from passing on reapportionment decisions applicable to county boards. See *Glass v. Hancock County Election Comm.*, 378 U.S. 558 (1964); *Griffing v. Bianchi*, 382 U.S. 15 (1965).

Moreover, the effect of a decision invalidating the subject plan would be to make difficult orderly consideration of local legislation, by depriving counties of representation in one house of what is in effect their local legislature. This Court has refused to prevent even seriously malapportioned legislatures from continuing effectively to act as such, see *Fortson v. Toombs*, 379 U.S. 621 (1965); *Parsons v. Buckley*, 379 U.S. 359 (1965), cf. *Baker v. Carr*, 369 U.S. 186, 250 n. 5.

Invalidation of the present plan would also impair the viability of counties as political units. The strength of the counties has been recognized as one of the most progressive and admirable features of Maryland government. Maryland has avoided the political splintering into overlapping legislative, school, taxing and other districts characteristic of many jurisdictions. This overlapping, and resulting lack of coordination between different levels of government, has long been a source of concern to political scientists. See for instance the study of the New York Metropolitan Area by the recently appointed Undersecretary of Housing and Urban Development. Wood, *1400 Governments* (1960). Others have condemned "an approach (which) makes no allowance for the functional interrelationship of different levels of government." King, *The Reynolds Standard and Local Reapportionment,* 15 Buffalo L. Rev. 120, 141 (1965). The survival of counties as separate electoral units is relevant to their survival as viable governmental entities, just as the role of the states as electoral units in congressional and presidential elections is essential to a viable federalism. See Wechsler, *The Political Safeguards of Federalism,* 54 Colum. L. Rev. 543 (1954).

Likewise, there is a compelling case for allowing districts to be constructed on a county basis to insure continuity in contact with constituents and to minimize costs of seeking office. The President's recent State of the Union Message expressed great concern about costs which discourage men of modest means from seeking election. Considerations of a similar sort have been responsible for the changes made in recent years in legislative apportionment in Great Britain. In 1946 an earlier requirement that districts ordinarily not deviate from the norm by more than 25% was found to be "far too rigid" and was eliminated. Butler, *The Electoral System in Britain Since 1918* (2d ed.

1963), 214. The apportionment carried out pursuant to the revised provisions produced disparities between largest and smallest districts of more than 4 to 1.[10] Further amendments in 1958 had the agreement of all parties. 6 & 7 Eliz. 2, Ch. 26, see H.C. Deb. 583, c. 226-301, 585, c. 599-700, 1297-1305. Those amendments erect a presumption in favor of "preserving the status quo in areas where such a course appeared to be desirable and not inconsistent with the broad intention of the rules." The next apportionment will probably further increase disparities. See Richards, *Honorable Members* (1959) 44-49.

This Court referred approvingly to the British experience in *Reynolds v. Sims,* 377 U.S. at 568 n. 44. Professor Robert B. McKay has referred to it as exemplifying "the kind of flexibility that I think might be ordained by the Supreme Court if given an opportunity to work out these matters."[11] The British movement away from strict mathematical equality in the last twenty years rests on a realization that such a rule had adverse effects on the quality of representation. "Liberals had always assumed that the extension of the franchise would extend the popular basis of Parlia-

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[10] As of the 1964 election, the electorate in the seven smallest British constituencies was as follows: Western Isles, 23,699; Ross and Cromarty, 24,777; Orkney and Zetland, 25,481; Merioneth, 26,392; Caithness and Sutherland, 27,291; Kelvingrove, 28,407; Ladywood, 29,735. Other small constituencies included Leeds Southeast, 33,326; Glasgow Central, 30,465; London (Bermondsey) 35,845. The seven largest constituencies were Antrim South, 105,315; Down North, 97,151; Billericay, 96,762; Epping, 94,655; Portsmouth (Langstone) 91,587; Hornchurch, 90,828; Hitchin, 87,825. Nor were these isolated disparities; 94 constituencies had over 70,000 voters while 41 had fewer than 40,000, the optimum figure being 56,498. London *Times,* October 17 and 19, 1964. See Starzinger, *The British Pattern of Apportionment.* 41 Virginia Quarterly Review 321 (1965) on the general satisfaction with these arrangements.

[11] Hearings, *supra.* note 4, at p. 456.

ment without otherwise changing its nature and it was perhaps natural for them to be slow to realize that this was not to be the case. In practice the second Reform Act led to a growth of party organizations in the country and the development of the means by which party leaders could discipline their back-bench supporters. Members had to secure the voters of an electorate too numerous to be canvassed personally by the candidates, who therefore became dependent on the endorsement and support of a party organization." Birch, *Representative and Responsible Government* (1964) at 74. See Starzinger, *supra* at n. 10.

The arguments against proportional representation and elections at large also apply to other mathematically perfect arrangements which create fluctuating constituencies at the expense of community representation. In writing of countries that have used the former devices, Professor Lindsay Rogers of Columbia University observed "The rotten borough system has returned. Party machines determine the candidates who will have constituencies where nomination is equivalent to election, or who shall lead the lists of candidates when proportional representation is used." Rogers, *The Pollsters* (1949) at 221. It is desirable to maintain at least some stable political "societies small enough for their members to have personal acquaintance with each other, and to find their station through the appraisal of those who have first hand knowledge of them." Learned Hand, in *Proceedings of the Bar of the Supreme Court in Memory of Mr. Justice Brandeis,* 317 U.S. xi, xiv (1942).

It also is significant and not accidental that the subdivisions "overrepresented" under the subject plan are generally the subdivisions with the lowest per-capita income,

not areas that are prosperous and hence expanding.[12] Representation of subdivisions as such thus operates, by giving poorer and hence depopulating areas added influence in the legislature, to mitigate economic inequalities and further currently important national objectives. See Dahl, *A Preface to Democratic Theory* (1956) 145-51.

Likewise, it may be desirable slightly to limit representation of rapidly developing areas where political institutions have not become as stabilized. "Mobility has created neighborhoods of strangers and jurisdictions without traditions * * *. In this context, alienation from the political process, nonparticipation in the official system of politics or support for mass movements as an anti-politics reaction appears to be increasing in metropolitan areas." Hanson, *The Political Thicket* (1966), 132. Cf. *Drueding v. Devlin*, 380 U.S. 125 (1965) dismissing a challenge to Maryland's county residence requirement for voting in presidential elections. If such considerations can justify complete and purposeful disqualification of voters in statewide and even presidential elections, it would seem to follow *a fortiori* that they can justify somewhat reduced weight for votes in districting where this is an incidental result of other rational considerations.

5. The present case is especially appropriate as a vehicle for renewed consideration of apportionment questions.

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[12] The per capita income of Maryland subdivisions arranged in descending order of precise mathematical overrepresentation is as follows: Kent $1,115, Calvert $945, Queen Anne's $1,064, Caroline $1,117, Somerset $797, Garrett $731, Talbot $1,506, Worcester $998, Dorchester $1,141, Charles $1,230, Howard $1,944, St. Mary's $747, Cecil $1,113, Wicomico $1,349, Carroll $1,389, Montgomery $2,615, Prince George's $1,859, Anne Arundel $1,560, Baltimore County $2,167, Frederick $1,360, Harford $1,466, Baltimore City $1,634, Allegany $1,514, Washington $1,427. Interim Report of the Commission on State and County Finance (1965) p. 101.

The facts of the instant case present the case for separate county representation at its strongest. Likewise, they afford the Court an opportunity to clarify the extent of the discretion given state courts of equity in taking into account the exigencies imposed by time factors in providing for transition to more equitable representation. This Court has made plain that some leeway is left to the states in providing for orderly transitional arrangements. See *Roman v. Sincock*, 377 U.S. 695 (1964); *Hill v. Davis*, 378 U.S. 565 (1964); *Martin v. Bush*, 376 U.S. 222 (1964); *West v. Carr*, 378 U.S. 557 (1964); *Reynolds v. Sims*, 377 U.S. at 586-87. In the Maryland case, this Court recognized that the legislature could enact "temporary reapportionment legislation pending adoption of state constitutional provisions which comport with federal constitutional requirements" (377 U.S. 675-76). The Maryland legislature enacted a preferred plan more than trebling the representation of populous counties in the Senate, and also proposed a constitutional amendment as the first step in a process to reduce the need for local legislation (Acts 1965, ch. 493). Preparations are being made for a constitutional convention which will frame permanent apportionment provisions (Acts 1965, ch. 298, p. 421). It is respectfully submitted that the Court of Appeals erred in not considering that the need for orderly transitional arrangements to deal with local legislation could render the plan "a constitutional plan" for purposes of the 1966 election within the meaning of the language in *Maryland Committee v. Tawes*, 377 U.S. at 676 forbidding elections under "the existing or any other unconstitutional plan."

This Court thus has leeway in this case either to consider generally the "local subdivisions" problem or to render a judgment limited to the 1966 election, since the statute contains a severability clause (Sec. 3), questions

of severability in apportionment cases are questions of state law, *Forty-Fourth General Assembly of Colorado v. Lucas*, 379 U.S. 693, and it is plain that the 1966 election provisions would be severable under state law, *Baltimore City v. Stuyvesant Co.*, 226 Md. 379, 391, 174 A. 2d 153 (1963).

Ample time remains for this Court to render a judgment effective for the 1966 elections, since under the terms of Code (1965 Supp.) Art. 33, Sec. 62(a), primary elections are not to be conducted until September 13, 1966. The filing deadline for such primary elections is set by Code (1957) Art. 33, Sec. 56 at midnight, July 5, 1966.[13] The parties to this litigation have agreed at all of its stages to expedite consideration of it. The case was argued in Anne Arundel County Circuit Court barely three weeks after notice of intervention was filed, and was argued before the Court of Appeals of Maryland 12 days after entry of the trial court's decree.[14] Cf. the stay and order in *Parsons v. Buckley*, 379 U.S. 942 (1964).

CONCLUSION

The process of reapportionment has now taken place in nearly every state, including Maryland, and the "rural stranglehold" (377 U.S. at 674 n. 19) which this Court sought to remedy has been broken everywhere. The issues presented in the long-awaited "second round" of cases which have begun to appear on this Court's docket relate

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[13] Even if the case were heard thereafter, it would not be moot, since the plan could be made effective for the 1970 election.

[14] This petition for certiorari was filed within approximately 30 days of the rendition of opinions by the Court of Appeals. Cf. *Shub v. Simpson*, 340 U.S. 861 (1950), where this Court declined to review election cases on the basis of lower court orders unaccompanied by opinions.

less to the allocation of representation among areas in a state and more to the nature of the relationship of a representative to his constituents. The issues now relate not to whether the predominant forces in the community will be able to make their weight felt, but rather to whether representatives are to retain significant and continuous relationships with their districts.

Demands for mathematical perfection in apportionment and the creation of fluctuating constituencies crossing community boundaries may result, not in more representative and effective legislatures, but rather in making legislators overly dependent on the favor of political machines and pressure groups, agencies of mass communications, and the executive branch of government. If future historians are not to apply to the rules on reapportionment the words of Milton, "new presbyter is but old priest writ large," application and interpretation of the Court's earlier opinions is called for in a case in which the arguments for giving effect to the local subdivisions qualification apply with maximum force.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1173

HARRY R. HUGHES AND JOHN-CLARENCE NORTH,
Petitioners,

v.

W. F. STRONG, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

PETITIONERS' APPENDIX

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APPENDIX A — STATUTES

CHAPTER 3, MD. LAWS, 1965 SPECIAL SESSION

AN ACT to repeal Section 42 of Article 40 of the Annotated Code of Maryland (1957 Edition and 1964 Supplement), title "General Assembly," subtitle "Apportionment," and to enact in lieu thereof new Sections 42, 42A, 42B, 42C, 42D, and 42E, to stand in the place of the section so repealed, and to be under the new subheadings "House of Delegates" and "Senate," revising the laws now providing for the apportionment of representation in the House of Delegates and in the Senate of Maryland; providing for the apportionment, membership, and election of members of the House of Delegates and of the Senate, and for the districts which are to be the basis of representation in each of the two Houses; imposing certain duties upon the Governor of Maryland in relation to such apportionment, representation, and districts; providing for the effect of this Act upon certain sections in Article 3 of the Constitution of Maryland; providing for contingencies whereby part or all of this Act becomes no longer effective; providing for the non-effectiveness of other reapportionment plans in the event that this Act is found to be valid and requiring judicial determination of the validity of this Act; and relating generally to apportionment and representation in the House of Delegates and in the Senate of Maryland, to the election of members thereof, and to the duties of certain State officers in relation thereto.

SECTION 1. *Be it enacted by the General Assembly of Maryland,* That Section 42 of Article 40 of the Annotated Code of Maryland (1957 Edition and 1964 Supplement), title "General Assembly," subtitle "Apportionment," be and it is hereby repealed, and that new Sections 42, 42A, 42B, 42C, 42D, and 42E, be and they are hereby enacted in lieu thereof, to stand in the place of the section so repealed, and to be under the new subheadings "House of Delegates" and "Senate," all to read as follows:

House of Delegates

42.

The membership of the House of Delegates of Maryland shall consist of one hundred and forty-two (142) Delegates. Each county and Baltimore City shall have one Delegate as a minimum, making a total of twenty-four (24) Delegates. The remaining one hundred and eighteen (118) Delegates shall be apportioned among the several counties and Baltimore City according to the mathematical formula of equal proportions, as more particularly described elsewhere in this subheading.

42A.

(a) The mathematical formula of equal proportions shall be applied for apportioning one hundred and eighteen (118) of the memberships in the House of Delegates, after the initial award of one Delegate for each county and Baltimore City.

(b) The formula shall be applied by these computations: the population of each county and Baltimore City is separately divided by the geometric mean between the numerals 1 and 2 (1.414), next by the geometric mean between the numerals 2 and 3 (2.449), next by the geometric mean between the numerals 3 and 4 (3.464), and continuing in this progression so long as necessary to complete the computation.

(c) The resulting quotients for the House of Delegates shall be arranged in order of size, from the largest to the smallest, and the first one hundred and eighteen (118) listings give additional memberships to the particular county or Baltimore City; and the Delegates thus allocated to Baltimore City shall be apportioned among the several legislative districts of the City in the same manner.

42B.

(a) If a county under the calculations required by this subheading is awarded more than eight (8) Delegates, the county shall be divided into districts.

(b) If Baltimore City under the calculations required by this subheading is awarded more than forty-eight (48) Delegates, the City shall be divided into additional legislative districts from time to time.

(c) In any such division, the county or Baltimore City shall be divided into districts under the formula in this subheading, with not fewer than four Delegates and not more than eight Delegates in any one district.

(d) Districts for membership in the House of Delegates shall be established by law, based substantially upon population, and as compact and contiguous as reasonably possible.

(e) All Delegates in a county which as districts shall be residents of and elected from their respective districts, and they shall not be elected from the entire county; and all Delegates in Baltimore City shall be residents of and elected from their respective districts, and they shall not be elected at large from Baltimore City. The Delegates shall have qualifications and residential requirements as provided in Section 9 of Article 3 of the Constitution of Maryland.

(f) The offices of Delegates here specified are created in the several counties. Baltimore City, and districts as this subheading is applied from time to time; and they shall be filled from time to time under the regular provisions for election or replacement.

42C.

(a) Beginning in the year 1970 and continuing thereafter, within one month after the publication of any Federal decennial census the Governor by proclamation shall announce the population determined in the census for each county and for Baltimore City. In the proclamation the Governor also shall announce the total number of Delegates to which each county and Baltimore City is entitled, according to the formulas and provisions contained in this subheading.

(b) At a session of the General Assembly after the proclamation by the Governor, the General Assembly by statute shall fix the boundary lines of districts if they are required under this subheading in any county or Baltimore City; or, if a change in existing districts is necessary or desirable, these boundary lines shall be fixed agreeably to the requirements and specifications of this subheading for districts. If this statute is not enacted by the General Assembly and signed by the Governor by the day which is five months prior to the next ensuing primary election at which candidates for the House of Delegates will be nominated, the Governor, agreeably to the other provisions of this subheading and by proclamation issued and published not later than thirty days after the beginning of this five-month period, shall fix the boundary lines of districts in any county or Baltimore City; and the boundaries of the several districts as thus fixed by the Governor shall be the boundaries until they are changed pursuant to the provisions of this subheading or by the General Assembly prior to the next or any subsequent primary election for members of the House of Delegates.

(c) At the time of the next regular election for members of the General Assembly (including primary and general elections) after the district lines are set by statute or by proclamation of the Governor, the number of Delegates specified in the statute or proclamation shall be elected for each county, and the number provided for each legislative district that may be created and described in the statute or proclamation shall be elected. The apportionment thus made shall continue until changed under this subheading. Nothing in the proclamation, statute or proclamation, or election affects the election, tenure, powers, or duties of Delegates in office at the time these events occur, for the remainder of the terms in which they are then serving.

(d) The foregoing provisions of this section do not apply, and the following provisions of this section do apply, to the elections for members of the House of Delegates in the years 1966 and 1970.

(e) The primary and general elections for members of the House of Delegates held in the years 1966 and 1970 shall be based upon a statute enacted by the General Assembly which announces the population for each county and Baltimore City, as determined in the regular Federal decennial census in the year 1960. The number of Delegates to which each county and Baltimore City is entitled, the number of districts in any county or Baltimore City, and the boundaries of these districts shall be for the elections in the year 1966 and in the year 1970 as fixed by statute of the General Asembly enacted by the General Assembly and signed by the Governor not later than the day which is five months prior to the next ensuing primary election at which candidates for the House of Delegates will be nominated. If this statute to fix the number of Delegates and the number of districts and to establish boundaries for the several districts is not enacted by the General Assembly and signed by the Governor by the day which is five months prior to the next ensuing primary election at which candidates for the House of Delegates will be nominated, the Governor, agreeably to the other provisions of this subheading and by proclamation issued and published not later than thirty days after the beginning of this five-month period, shall fix the number of Delegates to which each county and Baltimore City is entitled, the number of districts in any county or Baltimore City, and the boundaries of these districts; and these numbers and boundaries as fixed by the Governor shall remain as fixed until they are changed pursuant to the provisions of this subheading or by the General Assembly prior to the next or any subsequent primary election for members of the House of Delegates. Nothing in this subsection affects the election, tenure, powers, or duties of Delegates in office at the time these events occur, for the remainder of the terms in which they are then serving. This subsection becomes fully effective when the members of the House of Delegates have been elected in November, 1966, and in November, 1970, and thereafter have qualified for and entered upon their terms of office. This subsection does not apply, and subsections (a), (b), and (c) of this section

do apply (if still effective), to elections for members of the House of Delegates in any year after 1970.

42D.

(a) This subheading prevails to the extent of any inconsistency over Sections 2, 4, 5, 6, 9, and 13 of Article 3 of the Constitution of Maryland.

(b) This subheading provides for establishing the membership of and for fixing certain districts for representation in the House of Delegates of Maryland, until such time as it is superseded in whole or in part by an amendment to the Constitution of Maryland. With no further action required by the General Assembly, and to the extent of any conflict, this subheading is no longer effective, in whole or in part, as of the effective date of any such amendment of the Constitution of Maryland; except that nothing thereby affects the election, tenure, powers, or duties of Delegates in office at the time these events occur, for the remainder of the terms in which they are then serving.

Senate

42E.

(a) The membership of the Senate consists of fifty-three (53) Senators. The State is divided into twenty-nine State Senatorial Districts composed and to elect the number of Senators as follows:

(1) District 1—Garrett County—1 Senator.

(2) District 2—Allegany County—1 Senator.

(3) District 3—Washington County—1 Senator.

(4) District 4—Frederick County—1 Senator.

(5) District 5—Carroll County—1 Senator.

(6) District 6—Howard County—1 Senator.

(7) District 7—Montgomery County—6 Senators.

(8) District 8—Prince George's County—6 Senators.

(9) District 9—Charles County—1 Senator.

(10) District 10—St. Mary's County—1 Senator.

(11) District 11—Calvert County—1 Senator.

(12) District 12—Anne Arundel County—3 Senators.

(13) District 13—Baltimore City, First Legislative District—2 Senators.

The First Legislative District is composed of the area within wards one, two, three, four, and five; and within the area of precincts seven to fourteen inclusive, in ward number six; and in the area within the precincts one to twenty-nine, inclusive, of ward number twenty-six; and of those portions of precincts thirty-seven and thirty-eight of ward number twenty-six which are situated southeasterly from the center line of Sinclair Lane; and of the area within precinct thirty-nine of the twenty-sixth ward.

(14) District 14—Baltimore City, Second Legislative District—2 Senators.

The Second Legislative District is composed of the area within precincts one to six, inclusive, of ward number six; and of the area within ward number 7; and of the area within precincts two and three and within precincts fourteen to twenty-six, inclusive, in ward number eight; and of the area within precincts six to twenty-two, inclusive, of ward number nine; and of the area within precinct twenty-five of ward number nine; and of the area within wards numbers 10, 11, and 12; and of the area within precincts one, two, and twelve of ward number fourteen; and of the area within precincts thirty to thirty-four, inclusive, of ward number twenty-six.

(15) District 15—Baltimore City, Third Legislative District—2 Senators.

The Third Legislative District is composed of the area within precinct one and of precincts four to thirteen, inclusive, of ward number eight; and of the area within

precincts one through five, inclusive, and of precincts twenty-three, twenty-four, and of precincts twenty-six to thirty-one, inclusive, of ward number nine; and of the area within precincts thirty-five and thirty-six in ward number twenty-six; and of those portions of precincts thirty-seven and thirty-eight in ward number twenty-six lying northwesterly of the center line of Sinclair Lane; and of precincts forty, forty-one, forty-two, forty-three, forty-four, and forty-five in ward number twenty-six; and of the area within precincts one to seventy-seven, inclusive, of ward number twenty-seven.

(16) District 16—Baltimore City Fourth Legislative District—2 Senators.

The Fourth Legislative District is composed of the area within ward thirteen; and of the area within precincts three to eleven, inclusive of ward fourteen; and of the area within precincts four, four-a, four-b, four-c, ten, and seventeen to forty-two, inclusive, in ward fifteen; and of the area within precincts one to seven, inclusive, and within eighteen to twenty-five, inclusive, of ward sixteen; and of the area within ward seventeen; and of the area within precincts ninety-five, ninety-six; ninety-seven and ninety-nine of ward twenty-seven.

(17) District 17—Baltimore City, Fifth Legislative District—2 Senators.

The Fifth Legislative District is composed of the area within precincts one, two, three, five to nine, inclusive, and eleven to sixteen, inclusive, in ward fifteen; and of the area within precincts eight to seventeen, inclusive, in ward sixteen; and of the area within precincts one to twelve, inclusive, and within precincts sixteen, seventeen, and eighteen, and within precincts twenty-one to twenty-five, inclusive, of ward number twenty; and of the area within precincts seventy-eight to ninety-four, inclusive, and of precincts ninety-eight and of precincts one hundred to one hundred five, inclusive of ward number twenty-seven; and of the area within ward number twenty-eight.

(18) District 18—Baltimore City, Sixth Legislative District—2 Senators.

The Sixth Legislative District is composed of the area within ward eighteen and ward nineteen and of the area within precincts thirteen, fourteen, fifteen, nineteen, and twenty in ward twenty and of the area within wards twenty-one, twenty-two, twenty-three, twenty-four and twenty-five.

(19) District 19—Baltimore County—7 Senators.

(20) District 20—Harford County—1 Senator.

(21) District 21—Cecil County—1 Senator.

(22) District 22—Kent County—1 Senator.

(23) District 23—Caroline County—1 Senator.

(24) District 24—Queen Anne's County—1 Senator.

(25) District 25—Talbot County—1 Senator.

(26) District 26—Dorchester County—1 Senator.

(27) District 27—Wicomico County—1 Senator.

(28) District 28—Worcester County—1 Senator.

(29) District 29—Somerset County—1 Senator.

(A-1) Any Senatorial District which is entitled under the provisions of this section to elect more than two Senators shall be divided into subdistricts. Each subdistrict shall elect a number of Senators which shall be not more than two Senators from each subdistrict. If the subdistricting of any Senatorial District has not been accomplished by April 1, 1966, by act of the General Assembly, the Governor of Maryland by proclamation shall forthwith determine the number and boundaries of the subdistricts, but not later than May 1, 1966.

(b) The regular elections in the years 1966 and 1970, for four year terms in the Senate of Maryland beginning respectively in the month of January, 1967, and in the month of January, 1971, shall be on the basis of the Dis-

tricts and numbers of Senators provided in Subsection (a) of this section. The same Districts and number of Senators shall apply to subsequent elections and terms unless they are changed pursuant to the provisions of this section which follow.

(c) No person shall be eligible as a Senator who at the time of his election is not a citizen of the State of Maryland, and who has not resided therein for at least three years next preceding his election, and the last year thereof, in the State Senatorial District which he may be chosen to represent, if such Senatorial District shall have been so long established; and if not, then in a portion of a county or of Baltimore City which is a part of the State Senatorial District; and no person shall be eligible as a Senator unless he shall have attained the age of twenty-five years at the time of his election.

(d) This section establishes the Districts and membership of the Senate of Maryland until such time as it is superseded by an amendment for that purpose to the Constitution of Maryland. Automatically, and with no further action required by the General Assembly, it is repealed and no longer in force as of the effective date of such an amendment to the Constitution; except that such repeal does not affect the election, tenure, powers, privileges, and duties of any member of the Senate in office at the time of the repeal, for the remainder of the term for which he has been elected.

(e) This subheading prevails to the extent of any inconsistency over Sections 2, 4, 9, and 13 of Article 3 of the Constitution of Maryland.

(f) If an amendment to the Constitution of the United States is proposed and ratified providing in substance that one House of a State Legislature may be established and composed of representatives chosen on a ground, or grounds, other than that of population, or if the Congress of the United States by statute modifies the jurisdiction of the Federal courts of the United States so that the Courts have no jurisdiction in cases involving the membership

and districts of one House of a State Legislature, this subheading is no longer effective, and the membership and composition of the Senate of Maryland shall be as on January 1, 1965. At that time, if it is at least ninety days prior to the next ensuing primary election at which nominees for the Senate of Maryland are to be chosen, and with no further action required by the General Assembly of Maryland, this subheading is no longer effective; except that nothing thereby affects the election, tenure, powers, or duties of the Senators in office at the time these events occur, for the remainder of the terms in which they are then serving. If the amendment to the Constitution of the United States is ratified less than ninety days prior to the next ensuing primary election in the State of Maryland at which nominees for the Senate of Maryland are to be chosen, or if the statute of the Congress becomes effective less than ninety days prior to that primary election, the primary election and the next ensuing general election shall be conducted under the provisions of this subheading, and at the primary and general elections for the Senate of Maryland occurring four years later, and thereafter, the membership and composition of the Senate of Maryland shall be as on January 1, 1965.

SEC. 2. *And be it further enacted,* That if a proposed amendment to the Constitution of Maryland, enacted by the General Assembly at the Special Session of 1965 and concerning the subject matter of this Act (in addition to certain other matters) is submitted to the qualified voters of the State for adoption or rejection at the regular election in the month of November, 1966, and fails of adoption by the qualified voters of Maryland, this Act is repealed as of the date of the Governor's proclamation as to the rejection of the proposed amendment to the Constitution, with no further action required by the General Assembly; but nothing in this repeal affects the election, tenure, powers, or duties of Delegates and Senators in office at the time the repeal takes effect, for the remainder of the terms in which they are then serving.

SEC. 3. *And be it further enacted,* That if any word, phrase, clause, section, or other provision of this Act is

declared unconstitutional or invalid by a court of final appeal, the unconstitutionality or invalidity shall not affect any other word, phrase, clause, section, or provision of this Act, and to this end the provisions of this Act are declared severable.

SEC. 4. *And be it further enacted,* That in the event this Act shall be declared valid by the Court of Appeals of Maryland, then chapter ..... (Senate Bill No. 5) as enacted by the General Assembly at the Special Session of October 1965 shall not become effective and the Attorney General of Maryland is hereby directed to promptly request a judicial determination of this Act by the appropriate legal procedure.

SEC. 5. *And be it further enacted,* That, subject to the provisions of Sec. 4 above; this Act shall take effect June 1, 1966.

CHAPTER 2, MD. LAWS, 1965 SPECIAL SESSION

AN ACT to repeal Section 42 of Article 40 of the Annotated Code of Maryland (1957 Edition and 1964 Supplement), title "General Assembly," subtitle "Apportionment," and to enact in lieu thereof new Sections 42, 42A, 42B, 42C, 42D, and 42E, to stand in the place of the section so repealed, and to be under the new subheadings "House of Delegates" and "Senate," revising the laws now providing for the apportionment of representation in the House of Delegates and in the Senate of Maryland; providing for the apportionment, membership, and election of members of the House of Delegates and of the Senate, and for the districts which are to be the basis of representation in each of the two Houses; imposing certain duties upon the Governor of Maryland in relation to such apportionment, representation, and districts; providing for the effect of this Act upon certain sections in Article 3 of the Constitution of Maryland; providing for contingencies whereby part or all of this Act becomes no longer effective; and relating generally to apportionment and representation in the House of Delegates and

in the Senate of Maryland, to the election of members thereof, and to the duties of certain State officers in relation thereto.

SECTION 1. *Be it enacted by the General Assembly of Maryland,* That Section 42 of Article 40 of the Annotated Code of Maryland (1957 Edition and 1964 Supplement), title "General Assembly," subtitle "Apportionment," be and it is hereby repealed, and that new Sections 42, 42A, 42B, 42C, 42D, and 42E, be and they are hereby enacted in lieu thereof, to stand in the place of the section so repealed, and to be under the new subheadings "House of Delegates" and "Senate," all to read as follows:

House of Delegates

42.

The membership of the House of Delegates of Maryland shall consist of one hundred and forty-two (142) Delegates. Each county and Baltimore City shall have one Delegate as a minimum, making a total of twenty-four (24) Delegates. The remaining one hundred and eighteen (118) Delegates shall be apportioned among the several counties and Baltimore City according to the mathematical formula of equal proportions, as more particularly described elsewhere in this subheading.

42A.

(a) The mathematical formula of equal proportions shall be applied for apportioning one hundred and eighteen (118) of the memberships in the House of Delegates, after the initial award of one Delegate for each county and Baltimore City.

(b) The formula shall be applied by these computations: the population of each county and Baltimore City is separately divided by the geometric mean between the numerals 1 and 2 (1.414), next by the geometric mean between the numerals 2 and 3 (2.449), next by the geometric mean between the numerals 3 and 4 (3.464), and

continuing in this progression so long as necessary to complete the computation.

(c) The resulting quotients for the House of Delegates shall be arranged in order of size, from the largest to the smallest, and the first one hundred and eighteen (118) listings give additional memberships to the particular county or Baltimore City; and the Delegates thus allotted to Baltimore City shall be apportioned among the several legislative districts of the City in the same manner.

42B.

(a) If a county under the calculations required by this subheading is awarded more than eight (8) Delegates, the county shall be divided into districts.

(b) If Baltimore City under the calculations required by this subheading is awarded more than forty-eight (48) Delegates, the City shall be divided into additional legislative districts from time to time.

(c) In any such division, the county or Baltimore City shall be divided into districts under the formula in this subheading, with not fewer than four Delegates and not more than eight Delegates in any one district.

(d) Districts for membership in the House of Delegates shall be established by law, based substantially upon population, and as compact and contiguous as reasonably possible.

(e) All Delegates in a county which has districts shall be residents of and elected from their respective districts, and they shall not be elected from the entire county; and all Delegates in Baltimore City shall be residents of and elected from their respective districts, and they shall not be elected at large from Baltimore City. The Delegates shall have qualifications and residential requirements as provided in Section 9 of Article 3 of the Constitution of Maryland.

(f) The offices of Delegates here specified are created in the several counties, Baltimore City, and districts as

this subheading is applied from time to time; and they shall be filled from time to time under the regular provisions for election or replacement.

42C.

(a) Beginning in the year 1970 and continuing thereafter, within one month after the publication of any Federal decennial census the Governor by proclamation shall announce the population determined in the census for each county and for Baltimore City. In the proclamation the Governor also shall announce the total number of Delegates to which each county and Baltimore City is entitled, according to the formulas and provisions contained in this subheading.

(b) At a session of the General Assembly after the proclamation by the Governor, the General Assembly by statute shall fix the boundary lines of districts if they are required under this subheading in any county or Baltimore City; or, if a change in existing districts is necessary or desirable, these boundary lines shall be fixed agreeably to the requirements and specifications of this subheading for districts. If this statute is not enacted by the General Assembly and signed by the Governor by the day which is five months prior to the next ensuing primary election at which candidates for the House of Delegates will be nominated, the Governor, agreeably to the other provisions of this subheading and by proclamation issued and published not later than thirty days after the beginning of this five-month period, shall fix the boundary lines of districts in any county or Baltimore City; and the boundaries of the several districts as thus fixed by the Governor shall be the boundaries until they are changed pursuant to the provisions of this subheading or by the General Assembly prior to the next or any subsequent primary election for members of the House of Delegates.

(c) At the time of the next regular election for members of the General Assembly (including primary and general elections) after the district lines are set by statute or by proclamation of the Governor, the number of Delegates

specified in the statute or proclamation shall be elected for each county, and the number provided for each legislative district that may be created and described in the statute or proclamation shall be elected. The apportionment thus made shall continue until changed under this subheading. Nothing in the proclamation, statute or proclamation, or election affects the election, tenure, powers, or duties of Delegates in office at the time these events occur, for the remainder of the terms in which they are then serving.

(d) The foregoing provisions of this section do not apply, and the following provisions of this section do apply, to the elections for members of the House of Delegates in the years 1966 and 1970.

(e) The primary and general elections for members of the House of Delegates held in the years 1966 and 1970 shall be based upon a statute enacted by the General Assembly which announces the population for each county and Baltimore City, as determined in the regular Federal decennial census in the year 1960. The number of Delegates to which each county and Baltimore City is entitled, the number of districts in any county or Baltimore City, and the boundaries of these districts shall be for the elections in the year 1966 and in the year 1970 as fixed by statute of the General Assembly enacted by the General Assembly and signed by the Governor not later than the day which is five months prior to the next ensuing primary election at which candidates for the House of Delegates will be nominated. If this statute to fix the number of Delegates and the number of districts and to establish boundaries for the several districts is not enacted by the General Assembly and signed by the Governor by the day which is five months prior to the next ensuing primary election at which candidates for the House of Delegates will be nominated, the Governor, agreeably to the other provisions of this subheading and by proclamation issued and published not later than thirty days after the beginning of this five-month period, shall fix the number of Delegates to which each county and Baltimore City is entitled, the

number of districts in any county or Baltimore City, and the boundaries of these districts; and these numbers and boundaries as fixed by the Governor shall remain as fixed until they are changed pursuant to the provisions of this subheading or by the General Assembly prior to the next or any subsequent primary election for members of the House of Delegates. Nothing in this subsection affects the election, tenure, powers, or duties of Delegates in office at the time these events occur, for the remainder of the terms in which they are then serving. This subsection becomes fully effective when the members of the House of Delegates have been elected in November, 1966, and in November, 1970, and thereafter have qualified for and entered upon their terms of office. This subsection does not apply, and subsections (a), (b), and (c) of this section do apply (if still effective), to elections for members of the House of Delegates in any year after 1970.

42D.

(a) This subheading prevails to the extent of any inconsistency over Sections 2, 4, 5, 6, 9, and 13 of Article 3 of the Constitution of Maryland.

(b) This subheading provides for establishing the membership of and for fixing certain districts for representation in the House of Delegates of Maryland, until such time as it is superseded in whole or in part by an amendment to the Constitution of Maryland. With no further action required by the General Assembly, and to the extent of any conflict, this subheading is no longer effective, in whole or in part, as of the effective date of any such amendment of the Constitution of Maryland; except that nothing thereby affects the election, tenure, powers, or duties of Delegates in office at the time these events occur, for the remainder of the terms in which they are then serving.

Senate

42E.

(a) The membership of the Senate consists of forty-three (43) Senators. The State is divided into sixteen

State Senatorial Districts composed and to elect the number of Senators as follows:

(1) District 1—Garrett, Allegany, and Washington Counties—3 Senators.

(2) District 2—Frederick and Carroll Counties—2 Senators.

(3) District 3—Montgomery and Howard Counties—5 Senators.

(4) District 4—Prince George's County—5 Senators.

(5) District 5—Charles and St. Mary's Counties—1 Senator.

(6) District 6—Anne Arundel and Calvert Counties—3 Senators.

(7) District 7—Baltimore City, First Legislative District—2 Senators.

The First Legislative District is composed of the area within wards one, two, three, four, and five; and within the area of precincts seven to fourteen inclusive, in ward number six; and in the area within the precincts one to twenty-nine, inclusive of ward number twenty-six; and of those portions of precincts thirty-seven and thirty-eight of ward number twenty-six which are situated southeasterly from the center line of Sinclair Lane; and of the area within precincts thirty-nine of the twenty-sixth ward.

(8) District 8—Baltimore City, Second Legislative District—2 Senators.

The Second Legislative District is composed of the area within precinct one to six, inclusive, of ward number six; and of the area within ward number 7; and of the area within precincts two and three and within precincts fourteen to twenty-six, inclusive, in ward number eight; and of the area within precincts six to twenty-two, inclusive, of ward number nine; and of the area within precinct twenty-five of ward number nine; and of the area within wards numbers 10, 11, and 12; and of the area within pre-

cincts one, two, and twelve of ward number fourteen; and of the area within precincts thirty to thirty-four, inclusive, of ward number twenty-six.

(9) District 9—Baltimore City, Third Legislative District—2 Senators.

The Third Legislative District is composed of the area within precinct one and of precincts four to thirteen, inclusive, of ward number eight; and of the area within precincts one through five, inclusive, and of precincts twenty-three, twenty-four, and of precincts twenty-six to thirty-one, inclusive, of ward number nine; and of the area within precincts thirty-five and thirty-six in ward number twenty-six; and of those portions of precincts thirty-seven and thirty-eight in ward number twenty-six lying northwesterly of the center line of Sinclair Lane; and of precincts forty, forty-one, forty-two, forty-three, forty-four, and forty-five in ward number twenty-six; and of the area within precincts one to seventy-seven, inclusive, of ward number twenty-seven.

(10) District 10—Baltimore City, Fourth Legislative District—2 Senators.

The Fourth Legislative District is composed of the area within ward thirteen; and of the area within precincts three to eleven, inclusive of ward fourteen; and of the area within precincts four, four-a, four-b, four-c, ten, and seventeen to forty-two, inclusive, in ward fifteen; and of the area within precincts one to seven, inclusive, and within eighteen to twenty-five, inclusive, of ward sixteen; and of the area within ward seventeen; and of the area within precincts ninety-five, ninety-six, ninety-seven and ninety-nine of ward twenty-seven.

(11) District 11—Baltimore City, Fifth Legislative District—2 Senators.

The Fifth Legislative District is composed of the area within precincts one, two, three, five to nine, inclusive, and eleven to sixteen, inclusive, in ward fifteen; and of the area within precincts eight to seventeen, inclusive.

in ward sixteen, and of the area within precincts one to twelve, inclusive, and within precincts sixteen, seventeen, and eighteen, and within precincts twenty-one to twenty-five, inclusive, of ward number twenty; and of the area within precincts seventy-eight to ninety-four, inclusive, and of precincts ninety-eight and of precincts one hundred to one hundred five, inclusive of ward number twenty-seven; and of the area within ward number twenty-eight.

(12) District 12—Baltimore City, Sixth Legislative District—2 Senators.

The Sixth Legislative District is composed of the area within ward eighteen and ward nineteen and of the area within precincts thirteen, fourteen, fifteen, nineteen, and twenty in ward twenty and of the area within wards twenty-one, twenty-two, twenty-three, twenty-four and twenty-five.

(13) District 13—Baltimore County—7 Senators.

(14) District 14—Harford County—1 Senator.

(15) District 15—Cecil, Kent, Queen Anne's, Caroline and Talbot Counties—2 Senators.

(16) District 16—Dorchester, Wicomico, Worcester and Somerset Counties—2 Senators.

(A-1) Any Senatorial District which is entitled under the provisions of this section to elect more than two Senators shall be divided into subdistricts. Each subdistrict shall elect a number of Senators which shall be not more than two Senators from each subdistrict. If the subdistricting of any Senatorial District has not been accomplished by April 1, 1966 by Act of the General Assembly, the Governor of Maryland by proclamation shall forthwith determine the number and boundaries of the subdistricts, but not later than May 1, 1966.

(A-2) In any Senatorial District comprising more than one county and having two Senators, not more than one resident of any one county may be nominated by one

political party at the primary election, unless the population of that one county exceeds the population of all the remaining counties in the district in the aggregate. Provided that any Senatorial candidate must be voted upon at large within the entire district at the primary election. The provisions of this subsection shall not apply to general elections for the office of State Senator.

(b) The regular elections in the years 1966 and 1970, for four year terms in the Senate of Maryland beginning respectively in the month of January, 1967, and in the month of January, 1971, shall be on the basis of the Districts and number of Senators provided in Subsection (a) of this section. The same Districts and number of Senators shall apply to subsequent elections and terms unless they are changed pursuant to the provisions of this section which follow.

(c) No person shall be eligible as a Senator who at the time of his election is not a citizen of the State of Maryland, and who has not resided therein for at least three years next preceding his election, and the last year thereof, in the State Senatorial District which he may be chosen to represent, if such Senatorial District shall have been so long established; and if not, then in a portion of a county or of Baltimore City which is a part of the State Senatorial District; and no person shall be eligible as a Senator unless he shall have attained the age of twenty-five years at the time of his election.

(d) This section establishes the Districts and membership of the Senate of Maryland until such time as it is superseded by an amendment for that purpose to the Constitution of Maryland. Automatically, and with no further action required by the General Assembly, it is repealed and no longer in force as of the effective date of such an amendment to the Constitution; except that such repeal does not affect the election, tenure, powers, privileges, and duties of any member of the Senate in office at the time of the repeal, for the remainder of the term for which he has been elected.

(e) This subheading prevails to the extent of any inconsistency over Sections 2, 4, 9, and 13 of Article 3 of the Constitution of Maryland.

(f) If an amendment to the Constitution of the United States is proposed and ratified providing in substance that one House of a State Legislature may be established and composed of representatives chosen on a ground, or grounds, other than that of population, or if the Congress of the United States by statute modifies the jurisdiction of the Federal courts of the United States so that the Courts have no jurisdiction in cases involving the membership and districts of one House of a State Legislature, this subheading is no longer effective, and the membership and composition of the Senate of Maryland shall be as on January 1, 1965. At that ime, if it is at least ninety days prior to the next ensuing primary election at which nominees for the Senate of Maryland are to be chosen, and with no further action required by the General Assembly of Maryland, this subheading is no longer effective; except that nothing thereby effects the election, tenure, powers, or duties of the Senators in office at the time these events occur, for the remainder of the terms in which they are then serving. If the amendment to the Constitution of the United States is ratified less than ninety days prior to the next ensuing primary election in the State of Maryland at which nominees for the Senate of Maryland are to be chosen, or if the statute of the Congress becomes effective less than ninety days prior to that primary election, the primary election and the next ensuing general election shall be conducted under the provisions of this subheading, and at the primary and general elections for the Senate of Maryland occurring four years later, and thereafter, the membership and composition of the Senate of Maryland shall be as on January 1, 1965.

SEC. 2. *And be it further enacted,* That if a proposed amendment to the Constitution of Maryland, enacted by the General Assembly at the Special Session of 1965 and concerning the subject matter of this Act (in addition to certain other matters) is submitted to the qualified voters

of the State for adoption or rejection at the regular election in the month of November, 1966, and fails of adoption by the qualified voters of Maryland, this Act is repealed as of the date of the Governor's proclamation as to the rejection of the proposed amendment to the Constitution, with no further action required by the General Assembly; but nothing in this repeal affects the election, tenure, powers, or duties of Delegates and Senators in office at the time the repeal takes effect, for the remainder of the terms in which they are then serving.

SEC. 3. *And be it further enacted,* That if any word, phrase, clause, section, or other provision of this Act is declared unconstitutional or invalid by a court of final appeal, the unconstitutionality or invalidity shall not affect any other word, phrase, clause, section, or provision of this Act, and to this end the provisions of this Act are declared severable.

SEC. 4. *And be it further enacted,* That this Act shall take effect June 1, 1966.

APPENDIX B — OPINIONS AND DECREES BELOW

II.

In the Circuit Court for Anne Arundel County

OPINION

In August 1960, the Maryland Committee for Fair Representation, et al., hereinafter referred to as Plaintiffs, brought this action against J. Millard Tawes, Governor of Maryland, et al., hereinafter referred to as Defendants, challenging the apportionment of the Maryland General Assembly. The Plaintiffs alleged that the apportionment of the General Assembly, pursuant to Article III, Sections 2 and 5, of the Maryland Constitution, as amended, discriminated against the inhabitants of the more populous areas of the State by according them substantially less representation than that given to persons residing in other areas of the State. The Plaintiffs contended that the alleged legislative malapportionment violated the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

On 21 February 1961, this Court sustained Defendants' demurrers and dismissed the complaint without leave to amend. On 25 April 1962, the Court of Appeals reversed the order and remanded the case for a hearing on the merits. 228 Md. 412, 180 A. 2d 656. Pursuant thereto, this Court held on 24 May 1962 that the apportionment of the Maryland House of Delegates invidiously discriminated against the citizens of Baltimore, Montgomery and Prince George's Counties, and that therefore Article III, Section 5 of the Maryland Constitution, which apportions seats in the House of Delegates, violates the Equal Protection Clause of the Fourteenth Amendment. No formal determination was made as to the validity of senatorial apportionment.

Subsequently, the Maryland General Assembly, called into special session by the Governor in May 1962, enacted temporary "stop-gap" legislation reapportioning the House of Delegates by allocating 19 additional seats to the more populous areas of the State.

Senatorial apportionment remaining inviolate, an appeal was taken by the Plaintiffs requesting that its constitutionality be determined. As a result, the Court of Appeals, on 8 June 1962, ordered the case remanded for a decision on the validity of Article III, Section 2 of the Maryland Constitution which provides for senatorial apportionment on a geographical basis. In a decision rendered on 28 June 1962, this Court upheld the apportionment of the Maryland Senate, placing considerable reliance on a comparison of that body with the United States Senate. On 23 July 1962, the Court of Appeals affirmed that decision in a per curiam order and, on 25 September 1962, filed its opinion. 229 Md. 406, 184 A. 2d 715.

Existing senatorial apportionment having been upheld, the November 1962 election of senators was conducted pursuant thereto, and delegates were elected under the scheme provided by the 1962 legislation.

Notice of appeal to the Supreme Court of the United States was filed, and that Court noted probable jurisdiction on 10 June 1963. 374 U.S. 804, 10 L. ed. 2d 1029,

83 S. Ct. 1691. The Supreme Court heard argument on 13 and 14 November 1963 and rendered a decision on 15 June 1964, reversing the decision of the Court of Appeals. 377 U.S. 656, 12 L. ed. 2d 595, 84 S. Ct. 1442. Chief Justice Warren, speaking for six members of the Court, delivered the majority opinion wherein it was held that the validity of the apportionment of both houses was before the Court, and that neither house was apportioned sufficiently on a population basis to be constitutionally sustainable.

The Court stated that the proper subject for judicial focus in a legislative apportionment controversy is the overall representation accorded the State's voters in both houses of a bicameral legislature. As a result, it was held that, regardless of existing House apportionment, the overall scheme of legislative representation in Maryland could not be sustained under the Equal Protection Clause since gross disparities from population-based representation existed in the apportionment of the Maryland Senate (App. I). The Court further held that any reliance on the federal analogy, as well as considerations of history and tradition, could not provide sufficient justification for substantial deviations from population-based representation in both houses of the General Assembly.

In remanding the case to the Court of Appeals, the Supreme Court stated at page 676:

> "Since primary responsibility for legislative apportionment rests with the legislature itself, and since adequate time exists in which the Maryland General Assembly can act, the Maryland Courts need feel obliged to take further affirmative action only if the legislature fails to enact a constitutionally valid state legislative apportionment scheme in a timely fashion after being afforded a further opportunity by the courts to do so. However, under no circumstances should the 1966 election of members of the Maryland Legislature be permitted to be conducted pursuant to the existing or any other unconstitutional plan. We therefore reverse the judgment of the Maryland Court

of Appeals, and remand the case to that Court for further proceedings not inconsistent with the views stated here and in our opinion in *Reynolds v. Sims*."

The case having been returned to the Court of Appeals, it was remanded to this Court on 23 September 1964, with directions to retain jurisdiction and to take affirmative action upon the application of any of the parties in the event the Maryland Legislature should fail to enact a constitutionally valid State legislative apportionment scheme prior to the 1966 primary elections.

In its regular 1965 session the Maryland General Assembly failed to enact any apportionment legislation and, as a result, was convened into special session by the Governor on 11 October 1965 for the purpose of enacting such legislation. In seeking to comply with the mandate of the Supreme Court, the Assembly enacted two reapportionment plans, known respectively as Senate Bill No. 5 and Senate Bill No. 8.

On 27 October 1964, the Honorable J. Millard Tawes, Governor of Maryland, signed both measures into law. On that same day, the Attorney General of Maryland, as counsel for the Defendants, filed a "Notice of Compliance and Petition for Final Decree" herein, asking this Court to determine whether one or both of the statutes met the requisite constitutional standards and further to issue a final decree to that effect.

Thereafter, the Plaintiffs filed an answer admitting the constitutionality of Senate Bill 5, but challenging the constitutionality of Senate Bill 8.

Subsequently, the sponsors of Senate Bill 8, Honorable Harry R. Hughes and Honorable John-Clarence North, members of the Maryland Senate, as Intervenors, were permitted to intervene for the purpose of arguing the constitutionality of Senate Bill 8.

Both bills provide for the same state-wide representation in the House of Delegates, the constitutionality of which has not been contested. Considerable difference

exists, however, in the schemes for senatorial apportionment provided by the two measures.

Under Senate Bill 5 the Senate would be divided into 16 senatorial districts from which 43 senators would be elected, each district electing at least one senator. Whereas, under Senate Bill 8, the State would be divided into 29 senatorial districts from which 53 senators would be elected, each district likewise electing at least one senator.

Senate Bill 8 is a most unusual legislative measure in that it provides the following in Section 4 of the Bill:

> "And be it further enacted, that in the event this act shall be declared valid by the Court of Appeals of Maryland, then Chapter ..... (Senate Bill No. 5) as enacted by the General Assembly at the special session of October 1964 shall not become effective and the Attorney General of Maryland is hereby directed to promptly request a judicial determination of this act by the appropriate legal procedure."

In *Maryland Committee v. Tawes*, 377 U.S. 656, 12 L. ed. 2d 595, 84 S. Ct. 1442, the Court held that it is impossible to decide upon the validity of the apportionment of one house of the Maryland General Assembly in abstract. The Court stated at page 673:

> "Rather, the proper, and indeed indispensable, subject for judicial focus in a legislative apportionment controversy is the overall representation accorded to the State's voters, in both houses of a bicameral state legislature."

Since both bills provide for the same representation in the House of Delegates, a determination of the constitutionality of that scheme is logically a prerequisite to any consideration of senatorial apportionment. The proposed House apportionment provides for a 142-member House. Each of the 29 political subdivisions would receive a minimum of one delegate, the remaining 113 delegates to be apportioned by the mathematical formula of equal

proportions. The ideal population per delegate under such a scheme is 21,836. An examination of the proposed realignment shows that in 132 of the 142 House seats, a variance of less than 15% from that quotient would exist. Of the 10 seats which would exceed the 15% figure, the most serious would involve a deviation of 36%. Population per delegate would range from 15,481 in Kent County to 29,666 in Dorchester County, establishing a maximum disparity of less than 2 to 1 (App. II). The Supreme Court, in *Reynolds v. Sims,* supra, recognized that some divergences from population-based representation are permissible in either or both houses of a bicameral state legislature so long as they are the result of legitimate considerations incident to the effectuation of a rational state policy.

Of considerable significance is the fact that under this proposal the 19 least populous counties and the first, sixth, fourth, fifth and third legislative districts of Baltimore City, with 49.5% of the State's population would elect 71 delegates or 50% of the House, while the 4 largest suburban counties and the second district of Baltimore City, with 50.5% of the State's population would elect the remaining 71 delegates, likewise comprising 50% of the House. In the same vein, the 5 subdivisions having 75.3% of the State's population would elect 106 delegates or 74.7% while the remaining 19 subdivisions, with 24.7% of the population would elect 36 delegates or 25.3% of the membership of the House.

It would be difficult to conceive a plan which would more equitably apportion that body while still according individual political subdivisions some independent representation. While a few noticeable disparities exist, they are clearly the exception rather than the rule and are, in the opinion of this Court, the result of legitimate consideration incident to the effectuation of a rational state policy.

The proposed apportionment of the Maryland House of Delegates is, therefore, based sufficiently on population to be constitutionally sustainable, and is in no way violative

of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

It is now incumbent on this Court to determine the constitutionality of the proposed senatorial apportionment schemes in light of the overall representation to be accorded under each. The General Assembly has provided that the constitutionality of Senate Bill 8 be determined first.

Senate Bill 8 provides for a 53-member Senate to be elected from 29 senatorial districts. Each political subdivision would elect a minimum of 1 senator, the remainder to be apportioned on a population basis. The result would be the creation of senatorial districts wherein the population per senator would range from 15,481 in Kent County to 91,219 in Washington County. Under such a plan 36.7% of the State's population could theoretically elect a controlling majority of 27 senators. It is likewise significant that of the 29 proposed districts only 4 would involve a variance of less than 15% from the ideal population norm of 57,504, while other variances would range as high as 74% (App. III).

The disparities in population-per-senator figures are perhaps the most offensive characteristic of the Bill. The vote of a citizen of Kent or Calvert County is given 3½ times the weight of the vote of a citizen of Montgomery. Between Kent and Prince George's Counties the ratio is 4 to 1; between Kent and Anne Arundel Counties the ratio is 4½ to 1; between Calvert County and Baltimore City, the ratio is almost 5 to 1; between Kent and Charles Counties the ratio is 2 to 1; between Calvert and Wicomico Counties the ratio is 3 to 1; between Kent and Cecil Counties the ratio is 3 to 1; between Calvert and Dorchester Counties the ratio is 2 to 1; between Kent and St. Mary's Counties the ratio is more than 2 to 1, and, most significantly, the ratio between Kent County and Washington County approaches 6 to 1.

In attempting to justify these radical departures from population-based representation much has been made of the Maryland General Assembly's somewhat unique acti-

vity involving local legislation. The Supreme Court in *Reynolds v. Sims*, supra, recognized that factors such as local legislation may be considered in formulating an effective and rational apportionment scheme. Notwithstanding this recognition, the Court's mandate has remained clear and unequivocal. The Court stated at page 580:

> "Local governmental entities are frequently charged with various responsibilities incident to the operation of state government. *In many states much of the legislature's activity involves the enactment of so-called local legislation, directed only to the concerns of particular political subdivisions.* And a State may legitimately desire to construct districts along political subdivision lines to deter the possibilities of gerrymandering. *However, permitting deviations from population based representation does not mean that each local governmental unit or political subdivision can be given separate representation, regardless of population.* Carried too far, a scheme of giving at least one seat in one house to each political subdivision (for example, to each county) could easily result, in many States, in a total subversion of the equal-population principle in that legislative body. This would be especially true in a State where the number of counties is large and many of them are sparsely populated, and the number of seats in the legislative body being apportioned does not significantly exceed the number of counties. Such a result, we conclude, would be constitutionally impermissible. And careful judicial scrutiny must of course be given, in evaluating state apportionment schemes to the character as well as the degree of deviations from a strict population basis. *But if, even as a result of a clearly rational state policy of according some legislative representation to political subdivisions, population is submerged as the controlling consideration in the apportionment of seats in the particular legislative body, then the right of all of the State's citizens to cast an effective*

and adequately weighted vote would be unconstitutionally impaired." (E. S.)

Likewise, the Court in *Roman v. Sincock*, 377 U.S. 695, 12 L. ed, 2d 620, 84 S. Ct. 1462, recognizing that it is neither practicable nor desirable to establish rigid mathematical standards for evaluating the constitutionality of apportionment schemes, held at page 710:

"Rather, the proper judicial approach is to ascertain whether, under the particular circumstances existing in the individual State whose legislative apportionment is at issue, there has been a faithful adherence to a plan of population-based representation, with such *minor deviations* only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination." (E. S.)

This Court fails to see any merit in the argument that the Maryland General Assembly's activity involving local legislation is a consideration sufficient to justify the deviations from population-based representation embodied in Senate Bill 8. Major deviations being the rule rather than the exception, population is clearly submerged as the controlling consideration, while arbitrary and discriminatory considerations control. To give each political subdivision a representative in the Maryland Senate is hardly sufficient consideration for allowing one citizen's vote to be multiplied by 2, 3 or 5 while the vote of a citizen in another area of the State is to be counted at face value.

It has been suggested that should it be determined that Senate Bill 8 does not precisely conform to the requisite population standard, it should be sustained as an interim plan. Again, the mandate of the Supreme Court is clear. In *Md. Comm. v. Tawes,* supra, the Court stated at page 676:

"However, under no circumstances should the 1966 election of members of the Maryland Legislature be

permitted to be conducted pursuant to the existing or any other unconstitutional plan."

Senate Bill 8 is clearly violative of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States and is not constitutionally sustainable as either an interim or permanent apportionment plan.

Senate Bill 8 having been deemed unconstitutional, a determination must now be made as to the constitutionality of the senatorial apportionment scheme embodied in Senate Bill 5.

Senate Bill 5 provides for a 43-member Senate to be elected from 16 senatorial districts. While an ideal unit of population would be 72,109, the population per senator would range from 60,749 to 85,207. Under this bill, 47.8% of the State's population would be required to elect a majority of 22 senators.

In 4 of the 16 proposed districts, the population-per-senator figure would involve a variance of more than 15% from the ideal population norm. The variances involved would be 15.1%, 15.4%, 15.8% and 18.2%. The variances of 15.1% and 18.2% involve the Second and Third Districts of Baltimore City, and it is significant that when Baltimore City is viewed as a whole a variance of only 8.5% exists (App. IV).

The Supreme Court in *Reynolds v. Sims*, supra, at page 577, held that:

> "The Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable. We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement."

While a few small disparities exist, they are clearly the exception rather than the rule and are the result of legitimate considerations incident to the effectuation of a rational state policy in that they preserve existing subdivision boundaries as district boundaries and thereby discourage gerrymandering.

The proposed apportionment of the Maryland Senate as embodied in Senate Bill 5 is, therefore, based sufficiently on population to be constitutionally sustainable, and is in no way violative of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

For the reasons stated in this Opinion the Court will sign a decree, when submitted by counsel, declaring Senate Bill 8 unconstitutional, and further declaring Senate Bill 5 constitutional.

MATTHEW S. EVANS,
Judge.

APPENDIX I

POPULATION OF MARYLAND COUNTIES — 1960

Allegany	84,169	Harford	76,722
Anne Arundel	206,634	Howard	36,152
Baltimore	492,428	Kent	15,481
Baltimore City	939,024	Montgomery	340,928
Calvert	15,826	Prince George's	357,395
Caroline	19,462	Queen Anne's	16,569
Carroll	52,785	St. Mary's	38,915
Cecil	48,408	Somerset	19,623
Charles	32,572	Talbot	21,578
Dorchester	29,666	Washington	91,219
Frederick	71,930	Wicomico	49,050
Garrett	20,420	Worcester	23,733

APPENDIX II

Reapportionment of House of Delegates — 142 Members by Mathematical Formula of Equal Proportions

(Senate Bills 5 and 8)

County	*1960 Census*	*No. of Delegates*	*Population Per Delegate*	*% Variance Unit of Population*
Allegany	84,169	4	21,042	— 4
Anne Arundel	206,634	9	22,959	+ 5
Baltimore	492,428	22	22,383	+ 3
Baltimore City:				
District No. 1	126,611	6	21,102	— 3
District No. 2	169,308	8	21,164	— 3
District No. 3	167,163	8	20,895	— 4
District No. 4	159,385	7	22,769	+ 4
District No. 5	162,437	7	23,205	+ 6
District No. 6	154,120	7	22,017	+ 1
Calvert	15,826	1	15,826	—28
Caroline	19,462	1	19,462	—11
Carroll	52,785	2	26,393	+21
Cecil	48,408	2	24,204	+11
Charles	32,572	2	16,286	—25
Dorchester	29,666	1	29,666	+36
Frederick	71,930	3	23,977	+10
Garrett	20,420	1	20,420	— 7
Harford	76,722	4	19,181	—12
Howard	36,152	2	18,076	—17
Kent	15,481	1	15,481	—28
Montgomery	340,928	16	21,308	— 2
Prince George's	357,395	16	22,337	+ 2
Queen Anne's	16,569	1	16,569	—24
St. Mary's	38,915	2	19,458	—11
Somerset	19,623	1	19,623	—10
Talbot	21,578	1	21,578	+ 1
Washington	91,219	4	22,805	+ 4
Wicomico	49,050	2	24,525	+12
Worcester	23,733	1	23,733	+ 9
	3,100,689	142		

Ideal Mathematical Quotient = 21,836

APPENDIX III

Reapportionment of Senate

Senate Bill 8

Senatorial District	*County*	*1960 Census*	*No. of Senators*	*Population Per Senator*	*% Variance Unit of Population*
1	Garrett	20,420	1	20,420	−65
2	Allegany	84,169	1	84,169	+44
3	Washington	91,219	1	91,219	+56
4	Frederick	71,930	1	71,930	+23
5	Carroll	52,785	1	52,785	−10
6	Howard	36,152	1	36,152	−38
7	Montgomery	340,928	6	56,821	− 3
8	Prince George's	357,395	6	59,566	+ 2
9	Charles	32,572	1	32,572	−44
10	St. Mary's	38,915	1	38,915	−34
11	Calvert	15,826	1	15,826	−73
12	Anne Arundel	206,634	3	68,878	+18
	Baltimore City:				
13	District No. 1	126,611	2	63,306	+ 8
14	District No. 2	166,057	2	83,029	+42
15	District No. 3	170,414	2	85,207	+46
16	District No. 4	159,385	2	79,693	+36
17	District No. 5	162,437	2	81,219	+39
18	District No. 6	154,120	2	77,060	+32
19	Baltimore	492,428	7	70,347	+20
20	Harford	76,722	1	76,722	+31
21	Cecil	48,408	1	48,408	−17
22	Kent	15,481	1	15,481	−74
23	Caroline	19,462	1	19,462	−67
24	Queen Anne's	16,569	1	16,569	−72
25	Talbot	21,578	1	21,578	−63
26	Dorchester	29,666	1	29,666	−49
27	Wicomico	49,050	1	49,050	−16
28	Worcester	23,733	1	23,733	−59
29	Somerset	19,623	1	19,623	−67
		3,100,689	53		

Ideal Mathematical Quotient = 58,504

36.7% of the State's population could elect a majority of 27.

APPENDIX IV

Reapportionment of Senate

Senate Bill 5

Senatorial District	County	1960 Census	No. of Senators	Population Per Senator	% Variance Unit of Population
1	Garrett, Allegany, Washington	195,808	3	65,269	— 9.5
2	Frederick, Carroll	124,715	2	62,358	—13.5
3	Montgomery, Howard	377,080	5	75,416	+ 4.6
4	Prince George's	357,395	5	71,479	— 0.9
5	Charles, St. Mary's	71,487	1	71,487	— 0.9
6	Anne Arundel, Calvert	222,460	3	74,153	+ 2.8
	Baltimore City:	(939,024)	(12)	(78,252)	(+ 8.5)
7	District No. 1	126,611	2	63,306	—12.2
8	District No. 2	166,057	2	83,029	+15.1
9	District No. 3	170,414	2	85,207	+18.2
10	District No. 4	159,385	2	79,693	+10.5
11	District No. 5	162,437	2	81,219	+12.6
12	District No. 6	154,120	2	77,060	+ 6.9
13	Baltimore County	492,428	7	70,347	— 2.4
14	Harford	76,722	1	76,722	+ 6.4
15	Cecil, Kent, Queen Anne's, Caroline & Talbot	121,498	2	60,749	—15.8
16	Dorchester, Wicomico, Worcester & Somerset	122,072	2	61,036	—15.4
		3,100,689	43		

Ideal Mathematical Quotient = 72,109

47.8% of the State's population could elect a majority of 22.

DECREE

The above entitled cause having come on for hearing, the briefs and memoranda of all parties having been read, argument having been heard and considered, it is now, this 29th day of Dec. 1965, ORDERED, ADJUDGED AND DECREED:

1. That Senate Bill No. 5 of the Extraordinary Session of the General Assembly of Maryland of October 11, 1965, is valid and constitutional.

2. That Senate Bill No. 8 of the Extraordinary Session of the General Assembly of Maryland of October 11, 1965 is unconstitutional as violative of the Fourteenth Amendment of the Constitution of the United States and same is, therefore, null, void and ineffective.

3. That this Court will retain jurisdiction in this proceeding at least until the first day of June, 1966, at which time any of the parties hereto may file a petition for a final order dismissing this proceeding, or for such other relief as may be appropriate under the circumstances then prevailing.

/s/ MATTHEW S. EVANS

Matthew S. Evans

In The
Court of Appeals of Maryland
No. 487
September Term, 1965

PER CURIAM ORDER

For reasons to be stated in an opinion to be hereinafter filed, it is ORDERED by a majority of the Court of Appeals of Maryland, this 11th day of January, 1966, that the decree appealed from be, and it is hereby, affirmed.

/s/ STEDMAN PRESCOTT,
Chief Judge.

In The Court of Appeals of Maryland
No. 487
September Term, 1965

Harry R. Hughes, et al.
v.
Maryland Committee for Fair Representation, et al.

Prescott, C.J.
Hammond
Horney
Marbury
Oppenheimer
Barnes
McWilliams,
JJ.

Opinion by Prescott, C.J. Horney and Barnes, JJ. dissent.

Filed: March 2nd, 1966.

The importance of the result of our *per curiam* order herein, where a majority of the Court affirmed the holdings of the trial judge, would justify an opinion of very considerable length setting forth the reasons therefor. However, such a course is not necessary or desirable, and will not be followed. Although the subject of apportionment of State Legislatures has seemingly been the subject of more legal opinions[1] and law review articles[2] than any other single legal theme since the decision in *Baker*

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[1] Within nine months after *Baker v. Carr, infra,* litigation relative to apportionment had been begun in some 34 States.

[2] They run anywhere from "Courts in the Thicket," Hanson, 12 Amer. U. L. Rev. 51, to "Political Thickets and Crazy Quilts: etc.," McKay, 61 Mich. L. Rev., 645.

v. Carr, 369 U.S. 186 (1962) wherein the Supreme Court decided to place the apportionment of State Legislatures under the supervision of the Federal (as well as the State) Courts, the Supreme Court, which is the ultimate interpreter of the United States Constitution, has, itself, spoken in plain terms on the question presently involved. Hence, if we analyze the great number of state and lower federal court decisions, as well as the numerous law review articles, it would simply result in useless repetition and consumption of space, for all of them aim at trying to discover what the Supreme Court has said, and probably will say, on the subject. The answers to the questions herein involved are contained in the Supreme Court's opinions in the appeal in this case, *Maryland Committee, etc. v. Tawes*, 377 U.S. 656, and *Reynolds v. Sims*, 377 U.S. 533.

Two questions are presented: (1), Does Senate Bill 8 of the Acts of Assembly, Extraordinary Session 1965, constitutionally apportion the membership of the State Senate; and (2), If it does not, is Senate Bill 5 free of constitutional infirmity, because it apportions the membership of both the State Senate and the House of Delegates in a constitutionally permissible manner?

We set forth here a bare outline of the history of the case, because a detailed account thereof may be found in our two previous opinions (228 Md. 412 and 229 Md. 406) and the opinion of the Supreme Court on appeal thereto (377 U.S. 656). (There is a slight typographical error on page 663 where the opinion states this Court split 5-to-3 on its decision. The split was 4-to-3.)

The case originated in 1960 by a bill of complaint filed in the Circuit Court for Anne Arundel County. The plaintiffs alleged that the apportionment of the General Assembly, pursuant to Article IH, §§ 2 and 5, of the Maryland Constitution, discriminated against them as inhabitants and voters in the more populous areas of the State, by according them substantially less representation than that given to persons residing and voting in less populous areas. They requested declaratory and injunctive relief.

In February, 1961, the trial court sustained defendants' demurrers and dismissed the bill. In April of 1962, we reversed (splitting 5-to-2) and remanded. (228 Md. 412.) On May 24, 1962, the trial court held that the House of Delegates was unconstitutionally apportioned, but made no finding with reference to the Senate. The Legislature, called into special session by the Governor in May, 1962, enacted stop-gap legislation allocating 19 additional seats in the House of Delegates to the more populous areas of the State.

As the trial court made no ruling with reference to the apportionment of the Senate, the plaintiffs appealed to this Court. On June 8, 1962, we remanded for a decision on the question. The trial judge concluded that the Senate was constitutionally constituted, and the plaintiffs, again, appealed. This Court, splitting 4-to-3, affirmed. The plaintiffs appealed to the Supreme Court, where the holding was reversed, the Supreme Court holding that the apportionment of both the House of Delegates and the Senate was invidiously discriminatory and, therefore, unconstitutional and illegal. In compliance with the mandate from the Supreme Court, we remanded the case to the trial court with directions to retain jurisdiction and to take affirmative action upon application of any of the parties in the event that the Legislature failed to enact a constitutionally valid apportionment scheme prior to the 1966 primary elections.

At its regular 1965 session, the Legislature passed no reapportionment legislation. As a result thereof, the Governor convened a special session for the purpose of complying with the Supreme Court's mandate that such legislation must must be enacted. Senate Bills 5 and 8 resulted. Senate Bill 8 contains an unusual provision stating that if it "be declared valid by the Court of Appeals of Maryland," then Senate Bill 5 "shall not become effective." The purpose of this provision is, of course, to obtain for the less populous areas the more favorable representation afforded them by Senate Bill 8, if constitutionally permissible. The Governor signed both Bills, after pub-

licly announcing that he thought Senate Bill 8 unconstitutional, but that the Legislature was entitled to have the Court of Appeals pass upon that question first, if the Legislature so desired. This is the posture of the case as it reaches us at this time.

As previously indicated, we find it unnecessary, under the facts here presented, to set forth, elaborately, the applicable law. Although recognizing the impracticability of apportioning on the basis of an exact mathematical formula, in both the appeal in this case and in *Sims, supra,* the Supreme Court held, flatly, that each body of a bicameral state legislature must be apportioned *primarily* on a population consideration. In addition to this holding, the opinion in *Sims,* obligingly, went on to advise as to what probably would, and what probably would not, be constitutionally permissible under certain named circumstances. We quote pertinent excerpts therefrom:

> "* * * *Wesberry* clearly established that the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State."
>
> * * * * * *
>
> "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests."
>
> * * * * * *
>
> "Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race, * * *"
>
> * * * * * *
>
> "And, if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effec-

tively diluted. It would appear extraordinary to suggest that a State could be constitutionally permitted to enact a law providing that certain of the State's voters could vote two, five, or 10 times for their legislative representatives, while voters living elsewhere could vote only once. And it is inconceivable that a state law to the effect that, in counting votes for legislators, the votes of citizens in one part of the State would be multiplied by two, five, or 10, while the votes of persons in another area would be counted only at face value, could be constitutionally sustainable. Of course, the effect of state legislative districting schemes which give the same number of representatives to unequal numbers of constituents is identical."

* * * * * *

"While the result of a court decision in a state legislative apportionment controversy may be to require the restructuring of the geographical distribution of seats in a state Legislature, the judicial focus must be concentrated upon ascertaining whether there has been any discrimination against certain of the State's citizens which constitutes an impermissible impairment of their constitutionally protected right to vote."

* * * * * *

"But the basic principle of representative government remains, and must remain, unchanged — the weight of a citizen's vote cannot be made to depend on where he lives. Population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies."

* * * * * *

"Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators. To conclude differently, and to sanction minority control of state legislative bodies, would appear to deny majority

rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result."

* * * * * *

"We are told that the matter of apportioning representation in a state legislature is a complex and many-faceted one. We are advised that States can rationally consider factors other than population in apportioning legislative representation. We are admonished not to restrict the power of the States to impose differing views as to political philosophy on their citizens. We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us."

I

Senate Bill 8 provides for a 53-member Senate, to be elected from 29 senatorial districts (with a further provision relative to "subdistricts," not necessary to be considered in detail). One seat is allocated to each of 19 counties (Maryland, of course, has but 23), and the balance are allocated to the other (more populous) counties and the Legislative Districts of Baltimore City. It takes no more than a cursory examination of the Bill to see that its underlying scheme, glaringly, falls far short of the requisites laid down by the Supreme Court to render the provisions of a state apportionment measure constitutionally permissible.

Under the Bill, each district or subdistrict would elect at least 1 Senator. It will be unnecessary to state all of the disparities in population ratios in all of the districts and subdistricts; some of them follow. Kent and Calvert Counties, each with a population of about 15,000 souls (population will sometimes be referred to herein in even thousands), are given 1 Senator apiece, while 17 other counties, with larger populations, some with populations as high as 84,000 (Allegany) and 91,000 (Washington), are

also only allocated 1 senator each.[3] A simple arithmetical calculation shows the disparity in individual voting effectiveness to range to a ratio of just about 6 to 1. Baltimore City, with a population of 939,000 is allotted 12 senators; Baltimore County, with a population of 492,000, 7 senators; and Prince George's County, with a population of 357,000, 6 senators. Taking 15,000, the population of Calvert and Kent Counties, as a basis for calculation, it is seen that the votes of the people of Baltimore City, when compared with the votes of the people of those counties, are debased or diluted more than 5 to 1; the votes of the people of Baltimore County by over 4½ to 1; and the votes of the inhabitants of Prince George's County nearly 4 to 1.

Additionally, it should be noted that under the scheme of the Bill some 37% of the State's population would elect a majority of 27 senators.[3a] Also, it is significant that very few of the 29 Districts would involve a variance of less than 15% (a figure that some courts consider to be about the top variance allowable, except under very unusual circumstances, or necessary, in a few instances, to round off an otherwise rational state apportionment scheme), although some of the variances would range to about 74%.

A reading of the above facts discloses that Senate Bill 8 transgresses and runs counter to nearly, if not, all of the mandates contained in the excerpts we have quoted from *Sims*. It is not based, primarily, on a population scheme; on the contrary, it is patently based upon geographical consideration, with county lines forming the boundaries, for the main part, of the Senatorial Districts, and the Districts, as proposed, would without peradventure of

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[3] The populations of the counties and Baltimore City are stated in the appendices 1, 2 and 3 filed herewith. See also Appendix A and Appendix B on pp. 429 and 430 of 229 Md. These appendices show in detail the various disparities.

[3a] Appendix 3 shows that Somerset, Kent, Caroline, Queen Anne's, Talbot, Dorchester, Wicomico, Worcester, Cecil, Calvert, St. Mary's, Charles, Howard, Carroll and Garrett would each elect 1 Senator for a total of 15; Montgomery and Prince George's 12 for a total of 27 Senators.

The combined population of these counties is 1,138,563; which is 36.7% of the total population of 3,100,689.

doubt, discriminate against large segments of the citizens of the State in their "constitutionally protected right to vote" without those votes being diluted. It, possibly, would permit considerably less than a majority of the population to elect a majority of the Senators. It definitely and obviously makes the weight of the citizens' notes "depend on where [they] live," and this "weight" is shown to vary nearly to the ratio of 6 to 1.

However, counsel for the appellants, with commendable zeal[4] and at great length, have urged upon us that the disparities mentioned above are constitutionally permissible because of the large amount of local legislation considered by the members of the General Assembly, and the important role in Maryland played by its counties. We concede the postulates of this argument, and, in answering the same, would discuss and consider them at greater length, were it not for the fact that the Supreme Court has already answered the same, and its rulings upon the Federal Constitution are binding, not only upon us, but upon all of the Courts in this Nation. In *Sims*, at p. 578 of 377 U.S., the Chief Justice, for the Court, stated:

> "Since, almost invariably, there is a significantly larger number of seats in state legislative bodies to be distributed within a State than congressional seats, it may be feasible to use political subdivision lines to a greater extent in establishing state legislative districts than in congressional districting while still affording adequate representation to all parts of the State. To do so would be constitutionally valid, *so long as the resulting apportionment was one based sub-*

[4] Counsel for appellants advanced, with ability and skill, every seemingly possible argument favorable to their clients, and counsel for the other parties did likewise. The Attorney General points to his rather unusual role in not defending the constitutionality of a legislative enactment. We know of no reason why the Attorney General or any other lawyer, should stultify himself by arguing to the Court contrary to his honest beliefs. He would have been in a most anomolous situation, after advising the Legislature that Senate Bill 8 was unconstitutional, if he argued here that it was. In our judgment, the Attorney General and his staff who assisted him conducted themselves with proper decorum as officers of this Court.

stantially on population and the equal-population principle was not diluted in any significant way."

From our statement above of the provisions of the Bill, wherein the county lines are predominantly utilized for political subdivision purposes and the weight of citizens' votes are debased to a rate of 1 to 6, can it be seriously contended the Bill "Still afford[s] adequate representation to all parts of the State," or that the apportionment is one based *substantially* on population, and "the equal-population principle [has not been] diluted in any significant way"? We think not. The figures themselves show, to the point of mathematical demonstration, that the equal-population principle is attempted to be diluted to such an extent that the Bill has little resemblance to constitutional permissibility. In our judgment, the Bill attempts to "dilute" the equal-population rule to a point where we know of no ready "condiment" that would quickly restore its constitutional "flavor."

The Court, again, at page 580, recognizes that "some deviations from population-based representation" may be allowable in order to insure "some voice" to political subdivisions as political subdivisions, "as long as the basic standard of equality of population *among districts is maintained.*" (Emphasis ours.) Finishing the paragraph the Court concluded:

> "But if, even as a result of a clearly rational state policy of according some legislative representation to political subdivisions, *population is submerged as the controlling consideration* in the apportionment of seats in the particular legislative body, then the right of all of the State's citizen's to cast an effective and adequately weighted vote would be unconstitutionally impaired." (Emphasis again ours.)

The Court had already stated, as quoted above, "* * * if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part * * *, it could hardly be contended that the right to vote of those residing in the disfavored areas *had not been effectively diluted.*" (Emphasis added.) This portion of

the opinion makes clear what that Court meant when it used the phrase "population is submerged as the controlling consideration." With the disparity in the instant case ranging to some 6 to 1, we have no hesitancy in holding that population is submerged as the controlling consideration in Senate Bill 8, and its overall provisions render it constitutionally impermissible.

The Supreme Court, in *Sims*, clearly stated that, in considering the constitutional composition of a bicameral legislature, the make-up of both branches should be considered together, for it is possible that the composition of one body of such a legislature might prevent some deviation in the other body from being constitutionally impermissible, which would be impermissible if the composition of that body were considered alone. We have considered Senate Bill 8 in this light. It and Senate Bill 5 have identical provisions relative to the apportionment of the House of Delegates. We find nothing in the apportionment of the House, as we will explain it below, which would remedy the constitutional pitfalls of Senate Bill 8.

If we entertained any doubts whatever that our above holding is not directed and impelled by the decisions in *Sims, supra,* and the appeal of this case to the Supreme Court, they would be quickly dispelled by a reading of any one of three cases decided by that Court on the same day as *Sims* and the appeal herein: *WMCA, Inc., v. Lomenzo,* 377 U.S. 633, where New York's apportionment of both Houses was declared invalid; *Davis v. Mann,* 377 U.S. 678, which struck down Virginia's apportionment variances in the House ranging to 4.36 to 1, in the Senate to 2.65 to 1; and *Lucas v. Colorado General Assembly,* 377 U.S. 713, which dealt likewise with Colorado's apportionment where the disparities in the Senate ranged to 3.6 to 1, and in the House 1.7 to 1.

Appellants' final contention is that the Bill should be sustained as a valid stop-gap measure. The short but complete answer to this is the Supreme Court's command in its remand of the case to this Court: "However, under no circumstances should the 1966 election of members of the Maryland Legislature be permitted to be conducted pur-

suant to the existing or any other unconstitutional plan." 377 U.S. at p. 676.

II.

We turn to Senate Bill 5. None of the parties hereto contests its validity; however, in view of the mandate of the Supreme Court, mentioned above, we deem it appropriate to pass upon its validity.

This Bill presents a different picture from Bill 8. An analysis of Bill 5 discloses an underlying scheme of apportionment of each branch of the Maryland Legislature based primarily on the population of the State's residents. We consider first the provisions relative to membership of the Senate.

The State is divided into 16 Senatorial Districts from which 43 Senators will be elected; 3 from District 1, comprising Garrett, Allegany and Washington Counties; 2 from District 2, Frederick and Carroll Counties; 5 from District 3, Montgomery and Howard Counties; 5 from District 4, Prince George's County; 1 from District 5, Charles and St. Mary's Counties; 3 from District 6, Anne Arundel and Calvert Counties; 2 each from Districts 7-12 (the Legislative Districts of Baltimore City); 7 from District 13, Baltimore County; 1 from District 14, Harford County; 2 from District 15, Cecil, Kent, Queen Anne's, Caroline and Talbot Counties; and 2 from District 16, Dorchester, Wicomico, Worcester, and Somerset Counties. The bill provides for subdistricting any district entitled to elect more than 2 Senators.

Looking at the Bill in the light the Supreme Court has said that we must, i.e., placing the "judicial focus" on "the overall representation accorded to the State's voter," we find from Appendix 2 the following. The State's population (1960 census) is 3,100,689, which divided by 43 gives a mathematical unit of senatorial population of 72,109. The least percentage of the State's population which can elect a majority of 22 Senators will be 47.8. The Supreme Court, in one of the excerpts from *Sims* above, stated that it was not too much to expect from a proper apportionment that a majority of the voters be required in order to elect

a majority of the members of a legislature. However, the Court recognized that its suggested guidelines set forth therein were not inflexible, and, under warranted circumstances, they might yield slightly in order to accommodate and accomplish a rational state policy of apportionment. The rather small discrepancy here is not sufficient, we think, to destroy the validity of the reasonable and well thought-out apportionment of the members of the Senate.

Further, in no District is one voter's vote raised or diluted to a ratio of as much as 2 to 1. On the contrary, in only 4 of the 16 Districts does the population-per-senator figure vary more than 15% from the mathematical population norm,[5] and these exceed the 15% by small margins only (two of these are Legislative Districts in Baltimore City, whose overall variance is but 8.5%). And in 7 of the Districts the variance is less than 7%.

Although these comparatively small disparities exist, they are to be expected in nearly any rational overall State policy in reapportioning its Assembly, and they indicate no ulterior motives, for the Districts follow the boundaries of the present political subdivisions. The following of the existing boundaries, in and of itself, has certain distinct advantages, among them being the handling of voting machinery, its facility in conducting elections, and the less likelihood of any attempt at gerrymandering.

We hold that this Bill is an honest State effort to apportion the Senate on a population basis, and the small inequalities in voting strength mentioned above result from a good-faith attempt to effectuate a rational State policy, and that they are within the limitations set by the Supreme Court as being Constitutionally permissible.

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[5] The Supreme Court has not set an exact mathematical ratio, which will be constitutionally permissible or impermissible, and neither has any other Court to our knowledge. However, as we stated above, some Courts have adopted as a rule of thumb that a variance of over 15% from the population norm would be constitutionally suspect, while any lesser discrepancy would under ordinary circumstances, probably be constitutionally permissible. *Toombs v. Fortson*, 241 F. Supp. 65 (1965) (D.C., N.D. Ga.); *Silver v. Brown*, 405 P. 2d 132 (Sup. Ct. Cal. In Bank).

We turn now to the apportionment of the House of Delegates. Senate Bill 5 provides for a membership of 142 Delegates. Each county of the State and Baltimore City is allocated a minimum of 1 Delegate, accounting for 24 members. The remaining 118 seats are apportioned among the counties and Baltimore City according to the mathematical formula of equal proportions. The formula is applied by dividing the population of each county and the City, separately, by the geometrical mean between the numerals 1 and 2, 2 and 3, 3 and 4, and continuing in the progression so long as necessary to complete the computation. The resulting quotients for the House of Delegates are then arranged in order of numerical size, from the largest to the smallest, and the first 118 listings are given as additional memberships to the particular county or to Baltimore City. The Delegates thus allotted to the City are apportioned in the same manner and allocated to the several Legislative Districts thereof. The result of this "more or less fancy" mathematical calculation in apportioning the Delegates is shown, according to the parties, on Appendix 3.

The Bill also makes provision for dividing the counties and the City into districts, based on population, in the event any county is awarded more than 8 Delegates, or the City more than 48. It also provides for continuing its provisions in the elections after the year 1970, on the bases of federal decennial censuses. It is unnecessary to discuss the details of these provisions here.

An examination of Appendix 3 reveals that the mathematical unit of delegate population is 21,836. Each county obtains at least 1 member. Of the 142 seats, 132 will be elected by populations with variances less than 15% of the mathematical norm. The highest variance in the 10 seats which exceed 15% is one seat which ranges to 36%, but none of them reaches a disparity as great as 2 to 1. According to the decisions, 36% is, of course, high. However, as we stated above, the Supreme Court has recognized that some divergences from population-based representation are permissible, so long as they are the result of legitimate considerations incident to the effectuation

of a rational state policy, based principally upon population. *Reynolds v. Sims, supra; Roman v. Sincock*, 377 U.S. 695. Compare *Lucas v. Colorado General Assembly, supra* 377 U.S. 713. The parties to this appeal and the counsel who represent them have, for the main part, been vitally interested, for the last several years, in matters pertaining to apportionment, and have made careful studies of the decisions and writings thereon. They all agree that Bill 5 is constitutionally permissible. In light of the above and our own careful consideration of the matter, we are unwilling to strike down the Bill for the comparatively few "suspect" variances, which, in our view, clearly result from an earnest effort to accomplish a reasonable statewide apportionment, and, at the same time, accord some slight independent representation to individual, existing political subdivisions.

It will be noted that the 19 least populous counties and the First, Third, Fourth, Fifth and Sixth Legislative Districts of Baltimore City, with 49.5% of the State's population will elect 71 Delegates, constituting 50% of the membership and the remaining political subdivisions, with 50.5% will also elect 71 members. A further analysis of Appendix 3 discloses that 5 subdivisions, having 75.3% of the population, will select 106 Delegates, or 74.7% of the membership, while the remaining subdivisions, with 24.7% of the population will elect 36 members, constituting 25.3% of the total membership. To us, this demonstrates an honest and sincere apportionment, founded, primarily and principally, upon population.

We hold that Senate Bill 5 is constitutionally sustainable, and that it does not violate either the State or Federal Constitutions.

The above are the reasons that the majority passed the *per curiam* order herein.

THE MAJORITY PREVIOUSLY DIRECTED A PER CURIAM ORDER SUSTAINING THE ORDER OF THE TRIAL COURT. WE ADD TO THAT ORDER THAT THE TRIAL COURT RETAIN JURISDICTION AT LEAST UNTIL AFTER THE 1966 GENERAL ELECTIONS; AND THAT APPELLANTS PAY THE COSTS.

APPENDIX 1

Reapportionment of Senate

53 Members (Senate Bill 8)

Senatorial District	County	1960 Census	No. of Senators	Population Per Senator	% Variance Unit of Population
1	Garrett	20,420	1	20,420	−65
2	Allegany	84,169	1	84,169	+44
3	Washington	91,219	1	91,219	+56
4	Frederick	71,930	1	71,930	+23
5	Carroll	52,785	1	52,785	−10
6	Howard	36,152	1	36,152	−38
7	Montgomery	340,928	6	56,821	− 3
8	Prince George's	357,395	6	59,566	+ 2
9	Charles	32,572	1	32,572	−44
10	St. Mary's	38,915	1	38,915	−34
11	Calvert	15,826	1	15,826	−73
12	Anne Arundel	206,634	3	68,878	+18
	Baltimore City:				
13	District No. 1	126,611	2	63,306	+ 8
14	District No. 2	166,057	2	83,029	+42
15	District No. 3	170,414	2	85,207	+46
16	District No. 4	159,385	2	79,693	+36
17	District No. 5	162,437	2	81,219	+39
18	District No. 6	154,120	2	77,060	+32
19	Baltimore	492,428	7	70,347	+20
20	Harford	76,722	1	76,722	+31
21	Cecil	48,408	1	48,408	−17
22	Kent	15,481	1	15,481	−74
23	Caroline	19,462	1	19,462	−67
24	Queen Anne's	16,569	1	16,569	−72
25	Talbot	21,578	1	21,578	−63
26	Dorchester	29,666	1	29,666	−49
27	Wicomico	49,050	1	49,050	−16
28	Worcester	23,733	1	23,733	−59
29	Somerset	19,623	1	19,623	−67
		3,100,689	53		

1 Unit of Population is 58,504 (+15% = 67,280 −15% = 49,728)

APPENDIX 2

Senate Bill 5 — Third Reading Copy

Senator James Plan for Reapportionment of Senate With 43 Members

County	*1960 Census*	*No. of Senators*	*Population Per Senator*	*% Variance Unit of Population*
Garrett, Allegany, Washington	195,808	3	65,269	— 9.5
Frederick, Carroll	124,715	2	62,358	—13.5
Montgomery, Howard	377,080	5	75,416	+ 4.6
Prince George's	357,395	5	71,479	— 0.9
Charles, St. Mary's	71,487	1	71,487	— 0.9
Anne Arundel, Calvert	222,460	3	74,153	+ 2.8
Baltimore City:	(939,024)	(12)	(78,252)	(+ 8.5)
District No. 1	126,611	2	63,306	—12.2
District No. 2	166,057	2	83,029	+ 15.1
District No. 3	170,414	2	85,207	+ 18.2
District No. 4	159,385	2	79,693	+ 10.5
District No. 5	162,437	2	81,219	+ 12.6
District No. 6	154,120	2	77,060	+ 6.9
Baltimore County	492,428	7	70,347	— 2.4
Harford	76,722	1	76,722	+ 6.4
Cecil, Kent, Queen Anne's, Caroline & Talbot	121,498	2	60,749	—15.8
Dorchester, Wicomico, Worcester & Somerset	122,072	2	61,036	—15.4
	3,100,689	43		

1 Unit of Population is 72,109 (+15% = 82,925 −15% = 61,293)

APPENDIX 3

Reapportionment of House of Delegates 142 Members by Mathematical Formula of Equal Proportions

(Senate Bills 5 and 8)

County	*1960 Census*	*No. of Delegates*	*Population Per Delegate*	*% Variance Unit of Population*
Allegany	84,169	4	21,042	— 4
Anne Arundel	206,634	9	22,959	+ 5
Baltimore	492,428	22	22,383	+ 3
Baltimore City:				
District No. 1	126,611	6	21,102	— 3
District No. 2	169,308	8	21,164	— 3
District No. 3	167,163	8	20,895	— 4
District No. 4	159,385	7	22,769	+ 4
District No. 5	162,437	7	23,205	+ 6
District No. 6	154,128	7	22,017	+ 1
Calvert	15,826	1	15,826	—28
Caroline	19,462	1	19,462	—11
Carroll	52,785	2	26,393	+21
Cecil	48,408	2	24,204	+11
Charles	32,572	2	16,286	—25
Dorchester	29,666	1	29,666	+36
Frederick	71,930	3	23,977	+10
Garrett	20,420	1	20,420	— 7
Harford	76,722	4	19,181	—12
Howard	36,152	2	18,076	—17
Kent	15,481	1	15,481	—28
Montgomery	340,928	16	21,308	— 2
Prince George's	357,395	16	22,337	+ 2
Queen Anne's	16,569	1	16,569	—24
St. Mary's	38,915	2	19,458	—11
Somerset	19,623	1	19,623	—10
Talbot	21,578	1	21,578	+ 1
Washington	91,219	4	22,805	+ 4
Wicomico	49,050	2	24,525	+12
Worcester	25,733	1	23,733	+ 9
	3,100,689	142		

1 Unit of Population is 21,836 (+15% = 25,111 −15% = 18,561)

Dissenting Opinion by Barnes, J. in which Horney, J. concurs.

BARNES, J., dissenting.

I dissent because it seems clear to me that Chapter 3 of the Laws of Maryland (Special Session, October 1965) (Senate Bill 8) is a constitutionally valid legislative apportionment plan. Senate Bill 8 like Chapter 2 of the Laws of Maryland (Special Session, October 1965) (Senate Bill 5) provides for a House of Delegates of 142 members, but provides for a Senate of 53 members rather than a Senate of 43 members as provided for in Senate Bill 5. I agree with the majority that the apportionment for the House of Delegates is valid and constitutional, but I cannot agree that under the apposite decisions of the Supreme Court of the United States, the provision in Senate Bill 8 for a Senate of 53 members denies equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States (Fourteenth Amendment).

I do not understand that there is any disagreement that if the provisions for the 53 member Senate in Senate Bill 8 are constitutional, these provisions would be given effect in view of Section 4 of Senate Bill 8 which provides that "in the event this Act shall be declared valid by the Court of Appeals of Maryland, then Chapter 2 (Senate Bill 5) * * * shall not become effective * * *." This legislative mandate establishes the preference of the General Assembly for the 53 member Senate if the provisions of Senate Bill 8 establishing it do not contravene the provisions of the Fourteenth Amendment.

This legislative mandate comes to us with peculiar force in this case as it must be conceded that the apportionment of members in one of the houses of the Maryland bicameral legislature is, subject to Constitutional limitations, a purely legislative function in regard to which the judicial branch of the state government is forbidden by the Maryland Constitution to interfere. Article 8 of the Maryland Constitution in regard to separation of powers provides:

> "That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other."

Our predecessors indicated in 1829 in *Crane v. Meginnis*, 1 G. & J. 463, at 472 that:

> "The legislative department is nearest to the source of power, and manifestly the predominent branch of the government."

This of necessity must be the case in a representative form of government. We held in *First Continental Sav. & Loan Ass'n, Inc. v. Director, State Dept. of Assessments and Taxation*, 229 Md. 293, 302, 183 A. 2d 347, 351 (1962), that the powers of the General Assembly are plenary except as restrained by the State or federal constitutions.

Indeed, it was not until the decision of the Supreme Court of the United States (Supreme Court) in *Baker v. Carr*, 369, U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663, on March 26, 1962 that the judicial branch of government, State or Federal, could consider judicially whether or not a House of a State Legislature was constitutionally established. The Supreme Court itself had consistently held prior to *Baker v. Carr* that such an issue was not justiciable. The masterful dissenting opinion of Mr. Justice Frankfurter in *Baker v. Carr* reviewed the prior authorities (including *Kidd v. McCanless*, 352 U.S. 920, 77 S. Ct. 223, 1 L. Ed. 2d 157 (1956), decided only 5 years prior to *Baker v. Carr* in which the Supreme Court had itself by dismissing the appeal in *Kidd* held that the issues in regard to the composition of the Tennessee Legislature involved in *Baker v. Carr* were not justiciable) and pointed out the lack of wisdom and the dangers involved in departing from the well established doctrine in a most sensitive area of state-federal relations. I have not yet seen any satisfactory answers to the points made by Mr. Justice Frankfurter and Mr. Justice Harlan in their dissenting opinions in *Baker*, but I, of course, agree that we are bound by the

decisions of the majority of the Supreme Court on federal constitutional issues whether or not we think them sound or justified. It might be added that it was by no means clear, however, until our decision by a divided Court in *Maryland Committee for Fair Representation v. Tawes*, 228 Md. 412, 180 A. 2d 656 (1962) that our duty of obedience to the decisions of the majority of the Supreme Court extended to a holding that *this Court* had power *under the Maryland Constitution* to strike down a provision of that Constitution establishing the membership in the General Assembly. Judges Henderson and Horney in their dissent in the *Maryland Committee* case were of the opinion that this Court had no such power but that the exercise of that power resided only in the federal courts.

I review these rather recent adventures in constitutional law only to indicate that the entire field is a new one fraught with grave dangers in a delicate area of state-federal relations and in which the Supreme Court has established no certain guidelines, preferring — properly I think — to consider each case as it arises in the light of general constitutional concepts which the Supreme Court has enunciated.

I agree with the majority that the most important decision of the Supreme Court of the 6 reapportionment cases, decided June 15, 1964[1] bearing on the questions before us is *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964). Chief Justice Warren, for the Supreme Court, stated in *Reynolds v. Sims:*

> "For the present, we deem it expedient not to attempt to spell out any precise constitutional tests. What is marginally permissible in one State may be unsatisfactory in another, depending on the particular

[1] In addition to *Reynolds v. Sims*, they are *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 84 S. Ct. 1418, 12 L. Ed. 2d 568; *Maryland Committee v. Tawes*, 377 U.S. 656, 84 S. Ct. 1429, 12 L. Ed. 2d 595; *Davis v. Mann*, 377 U.S. 678, 84 S. Ct. 1441, 12 L. Ed. 2d 609; *Roman v. Sincock*, 377 U.S. 695, 84 S. Ct. 1449, 12 L. Ed. 2d 620; *Lucas v. Colorado General Assembly*, 377 U.S. 713, 84 S. Ct. 1459, 12 L. Ed. 632.

circumstances of the case. Developing a body of doctrine on a case-by-case basis appears to us to provide the most satisfactory means of arriving at detailed constitutional requirements in the area of state legislative apportionment." (377 U.S. 578)

The Supreme Court recognizes the obvious fact that in the 50 States there are substantial and important differences in political traditions, economic conditions, and historical background which would make a simplistic, arithmetical requirement for legislative apportionment unworkable, abhorrent to the people affected and possibly destructive of orderly representative government. In short, the Supreme Court has no notion of establishing a constitutional Procrustean Bed on which the legislatures of the 50 States will be forced and then cut off or stretched to conform to its precise measurements. In my opinion, the majority has been led astray by its failure to appreciate and apply this declared policy of the Supreme Court; it does not see the constitutional "woods" for the arithmetical "trees".

What then are the applicable general principles enunciated by the Supreme Court in the Reapportionment Cases? As I read these cases they are:

I. "* * * a majority of the people of a State should elect a majority of that States' legislators." (377 U.S. 565)

II. More flexibility is constitutionally permissible with respect to state legislative apportionment than in congressional districting and this flexibility is constitutionally valid "so long as the resulting apportionment was one based *substantially* on population and the equal-population principle *was not diluted in any significant way.*" (Emphasis supplied.) (377 U.S. 578)

III. "A state may legitimately desire to *maintain the integrity of various political subdivisions,* insofar as possible, and provide for compact districts of contiguous territory in designing a legislative apportionment scheme. * * * *Indiscriminate districting, without any regard for*

political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering." (Emphasis supplied.) (377 U.S. 578-579)

IV. "History indicates * * * that many States have deviated, to a greater or lesser degree, from the equal-population principle in the apportionment of seats in at least one house of their legislatures. So long as the divergences from a strict population standard are based *on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature.*" (Emphasis supplied.) (377 U.S. 579)

V. "A consideration that appears to be or more substance in justifying some deviations from population — based representation in state legislatures is that of *insuring some voice to political subdivisions, as political subdivisions.* Several factors make more than insubstantial claims that a State can rationally consider according political subdivisions some independent representation in at least one body of the state legislature, as long as the basic standard of equality among districts is maintained. *Local governmental entities are frequently charged with various responsibilities incident to the operation of state government.* In many States *much of the legislature's activity involves the enactment of so-called local legislation, directed only to the concerns of particular political subdivisions.*" (Emphasis supplied.) (377 U.S. 580-581)

VI. "But if, even as a result of a clearly rational state policy of according some legislative representation to political subdivisions, population *is submerged* as the controlling consideration in the apportionment of seats in the particular legislative body, then the right of all the State's citizens to cast *an effective and adequately weighted vote* would be unconstitutionally impaired." (Emphasis supplied). (377 U.S. 581).

In my opinion the above quotations are far more apposite to the situation involved in the case at bar than are

many of the quotations, also from *Reynolds v. Sims*, relied on in the majority opinion.

These general principles, particularly relevant to the case at bar, have for the most part, been given in the exact language used by Chief Justice Warren in enunciating them in *Reynolds v. Sims*. As he spoke for the majority of the Supreme Court, we are entitled, and indeed required, to take his words at their face value and to believe that the majority of the Supreme Court intends to adhere to them. In my opinion, the General Assembly and the people of this State are also entitled to have us apply these general principles to Senate Bill 8 and to sustain its constitutionality if the application of those principles permits it.

In my opinion, the provisions of Senate Bill 8 in regard to both the apportionment of seats in the House of Delegates and in the Senate fully comply with the general principles above set forth and Senate Bill 8 should be held to be constitutional as it does not deny citizens of any portion of this State the equal protection of the laws. As the majority agrees that the apportionment of the House of Delegates in Senate Bill 8 (which is the same as that in Senate Bill 5) is clearly constitutional, the discussion will be confined, for the most part, to the apportionment of the Senate.

I and II

In the apportionment of the Senate by Senate Bill 8, a majority of the Senate seats are allocated on the basis of population. The resulting apportionment is based *substantially on population* and the equal-population principle is *not diluted in any significant way*.

The Senate of Maryland as established by the people in the Constitution of 1867 did not purport to be based on any equal-population concept. It, as subsequently amended, provided for one senator from each county and one senator from each of the six legislative districts of Baltimore City regardless of population making a total of 29 senators. There were great disparities in the population of the various counties and Baltimore City legislative dis-

tricts and 19 counties with less than 25% of the population of the State elected 19, or approximately two-thirds of the senators.[2] There is no question that the apportionment of the senate under Senate Bill 8 is based generally upon the equal-population principle. The plan of apportionment adopted in Senate Bill 8 for the Senate, although the senators are allocated by number in senatorial districts, substantially follows the same population principle as that followed for the allocation of seats in the House of Delegates. The Senate Bill 8 senate plan allots one senator to each political subdivision for a total of 24 and allots 27 of the remaining 29 seats of the 53 member body on a population basis based on the equal-population principle. This is also the same type of rule used in apportioning the United States House of Representatives. Under a strict application of the equal population rule as to the remaining 29 seats, Baltimore City would receive 14 rather than 12 senators. Baltimore City, however, has for many years been divided into 6 legislative districts so that it was more practicable to allot 12 seats to Baltimore City thus giving each legislative district 2 senators each. In Senate Bill 5, Baltimore City is also given 12 senators. The 2 seats not given to Baltimore City were apportioned one each to Prince George's and Montgomery Counties, two of the most populous and rapidly growing subdivisions, which have senatorial ratios under Senate Bill 8 which are almost mathematically perfect. It is clear that over one-half of the 53 Senate seats are apportioned according to population and that the 5 most populous subdivisions (Baltimore City, Baltimore, Montgomery, Prince George's

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[2] Even this apportionment of the Senate when taken together with the reapportionment of the House of Delegates, was not thought by Mr. Justice Stewart, in his dissenting opinion, to be unconstitutional on its face or that the entire plan reflected "no policy, but simply arbitrary and capricious action or inaction." He indicated in *Maryland Committee v. Tawes*, 377 U.S. 656 at 677, 84 S. Ct. 1440, 12 L. Ed. 2d 608, that the case challenging the constitutionality of the Maryland Senate should be remanded to determine whether the Maryland apportionment, including the 29 member Senate, "could be shown systematically to prevent effective majority rule."

and Anne Arundel Counties) elect 34 of the 53 senators, or 64.15% of the Senate while the remaining counties elect only 19 of the 53 Senators, or 35.85% of the Senate.[3] This not only gives the most populous subdivisions majority control of the Senate but gives them more than the 60% majority needed to propose amendments to the Maryland Constitution (Art. XIV, Sec. 1), for enacting emergency legislation (Art. XVI, Sec. 2) and for overriding a veto by the Governor (Art. II, Sec. 17). It is quite apparent that under Senate Bill 8 the 5 most populous political subdivisions elect a large and dominating majority of the members of the Senate; and that the equal-population principle is indeed not "diluted in any substantial way." Effective majority rule is, in my opinion, clearly established.

III, IV and V.

As we have seen, the State may "legitimately desire to maintain the integrity of various political subdivisions."

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[3] In the majority opinion it is stated: "Additionally, it should be noted that under the scheme of the Bill (Senate Bill 8) some 37% of the State's population would elect, a majority of 27 senators." As explained in footnote 3a, of the majority opinion, this result is reached by combining the populations of 15 counties having the smallest populations and having 15 senators with two of the most populous counties, Montgomery and Prince George's, having 12 senators. Although the figures appear to be correct, the result has no political reality as this type of "combination" is most unlikely. Of far more significance in this case is the following: Using the 1960 census figures for population in Maryland the five most populous political subdivisions in Maryland containing 75.35% of the State's population elect 74.65% of the members of the House of Delegates and 64.15% of the members of the Senate. The remaining 19 less populous political subdivisions elect 24.65% of the members of the House of Delegates and 35.85% of the members of the Senate. The calculation is as follows:

	1960 Census		House		Senate	
	Population	*%*	*Seats*	*%*	*Seats*	*%*
Baltimore City, Baltimore County, Prince George's County, Montgomery County and Anne Arundel County	2,336,409	75.35	106	74.65	34	64.15
Remaining 19 Counties	764,280	24.65	36	25.35	19	35.85

The practicability of accomplishing this rational State purpose may vary from State to State but in Maryland, because of the unusual importance of the counties in the Maryland government and their relatively small number, it is practicable to preserve their identity and give them a voice in the Senate without violating the general equal-population principle.

The importance of the county in Maryland as a governmental unit derives, in part, from the early date of the creation of many of them. Eleven of the twenty-three counties were in existence in 1695.[4] The Maryland Constitution of 1867 by the provisions of Article XIII, Section 1, effectively, as a practical matter, prevents the creation of any counties in addition to those already established.[5] The unusual nature of the Maryland counties is set forth at page 419 of The Maryland Geological Survey, "The Counties of Maryland, Their Origin, Boundaries and Election Districts" (1907) as follows:

> "The counties in Maryland occupy a far more important position than do similar political divisions in many other states of the union. This prominence of the county is due primarily to the fact that in Maryland it serves as the unit of division of the territory of the State and is not formed by the combination of smaller integral unites, as is the case in the North and West, where townships with their own local political organization are the units of political division. Where townships exist they are united to form a county and the county organization is accordingly

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[4] The dates of the creation of the counties in Maryland are as follows: St. Mary's 1637, Kent 1642, Anne Arundel 1650, Calvert 1650, Charles 1658, Baltimore 1659, Talbot 1662, Somerset 1666, Dorchester 1668, Cecil 1679, Prince George's 1695, Queen Anne's 1706, Worcester 1742, Frederick 1748, Caroline 1773, Harford 1773, Washington 1776, Montgomery 1776, Allegany 1789, Carroll 1836, Howard 1851, Wicomico 1867, Garrett 1872.

[5] See Maryland Geological Survey, "The Counties of Maryland, Their Origin, Boundaries and Election Districts", (1907) at page 426. For a view of the distinctive history of each of the Maryland counties see pages 429 to 572.

more general and less complete than is the case in this state. Maryland possesses incorporated towns and villages analogous to those of other parts of the United States but the nearest analogue to a township — the election district, is not a political unit with its own individual government, but is rather a precinct serving for election and other purposes within the county. In Virginia, the counties are often composed of several Hundreds or Parishes which become the local units in popular consideration if not in political government."

Maryland has been fortunately spared the proliferation of incorporated towns and villages present in many states. Generally speaking the important municipal services outside of Baltimore City, are performed by the County governments. The need for local legislation is likely to continue to a substantial extent even though the Charter-type of County Government should be extended in the future.

In Maryland, health services are primarily organized at the county level.[6] Then too, jails, libraries,[7] the assessments of real property[8] and soil conservation programs[9] are organized on a county basis. Seventeen of the twenty-three counties construct, reconstruct and maintain their own road systems.[10]

An examination of the Maryland Manual, 1961-1962 pages 347, et seq., listing the local officials in even a small county such as Calvert County, indicates the wide range

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[6] In the Maryland Manual 1961-1962 at page 69 it is stated: "Local Health Services make public health service available to residents of Maryland through the twenty-four local health departments. These local health officers with their staffs of nurses, sanitarians, and others, are the backbone of public health services in Maryland. These local units operate the public health programs in each county and Baltimore City * * *."

[7] Md. Code, Art. 77, §§ 177-201.

[8] Md. Code, Art. 81, § 232, et seq.

[9] Md. Code, Art. 66C, § 91, see also Maryland Manual 1961-1962, p. 116.

[10] Maryland Manual, 1961-1962, p. 99.

of governmental services and responsibilities given to the county government. In many of the larger counties there are additional agencies and officials, including Planning Commissions, Zoning Boards, Plumbing Boards, Industrial Development Commissions, Building Inspectors, Inspectors of Weights and Measures, Parks Boards, Recreation Commissions and other boards and Commissions.

Most importantly, in Maryland one of the most vital and expensive of all governmental functions, namely, that of public education, is administered largely at the county, rather than at the State, level. In Maryland, the State, except in certain limited areas, retains only a visitorial power over the county school systems. In Andrews, "History of Maryland," pages 638-639, the learned author states:

> "* * * [I]n the original Maryland scheme there were twenty-three county boards, together with the independent unit of Baltimore City. These twenty-four boards in Maryland acquire especial significance when it is realized that New York, for example, has upward of ten thousand boards."

The unusual nature of the Maryland educational system of using counties as school districts is indicated by the fact that Maryland is one of only 5 States in the Union which has no school districts other than county units.[11]

When the expenditures of the local county government and those of the State government are considered, the importance of the county political subdivision is quite apparent. In the recent Interim Report of the Commission on State and County Finance (the Cooper Commission), it is indicated that in 1962 the direct expenditures of the local governments in Maryland amounted to $714,400,000.00, or 69.4% of the total expenditures of State and

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[11] The other States are Hawaii, Rhode Island, Virginia and North Carolina. See Anderson et al., "Government in the Fifty States." (Rev. ed. 1960) pages 24-25.

local governments. At page 13 of the Interim Report it is stated:

> "Of the total task of government, as measured by expenditures, the State bears about 30 percent and local governments bear 70 percent. The revenue sources are shared about 50-50. If highway expenditures and revenues are excluded * * * the division of responsibility becomes 25 percent State and 75 percent local, with the revenue split still remaining close to 50-50."

It seems clear, therefore, that in Maryland, the political subdivisions, given some (but not controlling) independent representation in the Senate by Senate Bill 8 are the basic framework in the governmental structure of the State. These political subdivisions carry out vital responsibilities of government in many most important areas, so that one of the factors mentioned in *Reynolds v. Sims* for a departure from population-based-representation is clearly met. It is present in Maryland to a far larger extent than was present in any of the reapportionment cases decided by the Supreme Court involving reapportionment plans in States other than Maryland.

As would be expected in a State in which the local political subdivisions are given such important governmental responsibilities, much of the legislation considered by the General Assembly of Maryland is "local legislation." The Chief Justice has quite properly indicated that this factor is one which may be considered as part of a rational State reapportionment policy justifying representation to a political subdivision, as such, and some divergence from a strict population standard.

This factor of "local legislation" applies with particular force in Maryland. Apparently Maryland is one of the few States in the Union having a published Code of Public Local Laws. Dr. Carl Everstine, the very able Director of the Department of Legislative Reference in "Maryland Legislative Council, Local Government: A Comparative Study" Research Report No. 23 (September 1944) page 1, stated:

> "Maryland occupies almost a unique position among the states, for its legislature gives perhaps more attention to the details of local government than does the legislature of any other state in the Union."

Dr. Everstine also pointed out the vital importance of the "local delegation" in the consideration of local bills as follows:

> "The rules of procedure adopted and followed by the legislatures of other states show an interesting contrast with those of Maryland with respect to the committees to which local bills may be assigned.
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> "Local bills introduced into the General Assembly of Maryland usually are referred to select committees made up, in the House, of the members of the county delegation concerned, and in the Senate, of the Senator from the county concerned and the senators from two adjoining counties. Occasionally, a bill which would affect only one county may yet have implications of state-wide importance which will lead to its being referred to a standing committee, but it is the general practice to refer all local bills to select committees, and the rest of the legislature accepts without question the recommendations of these committees. There are no standing committees to which all local bills may be referred simply by virtue of their being local bills.
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> "The practice in other states seems to be widely different than in Maryland. Every one of the other forty-seven states has one or more standing committees to which, so far as one may judge from their names, the local bills of *all* counties may be referred." (Emphasis in text.)[12]

In Maryland political life, the Senator from the county in regard to which the local legislation is concerned,

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[12] "Maryland Legislative Council, Local Government: A Comparative Study", Research Report No. 23 (September 1944) page 17.

usually plays a dominant role in its consideration, and ultimate passage or rejection. The senator has particular political responsibility in this field and is usually held accountable by the electorate for the success or failure of the local legislative program for the political subdivision. The senator has been thought of by his constituents as a member of the "upper" House of the bicameral legislature, and as such, to have greater authority and prestige than that enjoyed by the members of the House of Delegates. One might think that the senator's dominant position in local legislation would be taken over by the delegate in those counties who will only have one delegate, but this idea overlooks the political fact that *legislation must also pass the Senate.* There may well be a serious conflict between the policy advocated by the one delegate and that thought wise by a senator who does not reside in, and who is not politically dependent upon, the electorate from the county having the one delegate. And if the one-delegate county was in a senatorial district as provided for in Senate Bill 5 where there were *two* senators, neither of whom is from the one-delegate county, there might well be a divergence of opinion between the two senators with resulting confusion, lack of political responsibility and real injury to the local political subdivision involved. To take a concrete illustration from the provisions of Senate Bill 5, Senatorial District 15 is composed as follows: Cecil, Kent, Queen Anne's, Caroline and Talbot, having a combined population by the 1960 census of 121,498. Two senators are provided for Senatorial District 15. Under Senate Bill 5 the representation in the House of Delegates and the population of the individual counties would be as follows:

Name of County	*Number of Delegates*	*Population, 1960 Census*
Cecil	2	48,408
Kent	1	15,481
Queen Anne's	1	16,569
Caroline	1	19,462
Talbot	1	21,578
		121,498

It would seem reasonable to predict that Kent County with approximately 13% of the population of District 15 will most likely never have a senator from that county. Cecil County with approximately 40% of the total population of District 15 will most likely always have one senator. The other senator will most likely come from Talbot County having approximately 18% of the population of District 15. The *local* interests of Cecil County and Kent County may be quite different and if either one or both of the senators were not sympathetic with the local legislation presented by Kent County's one delegate, the local legislative program of Kent County would most likely never be enacted into law and there would be great difficulty in definitely fixing the political responsibility for that failure. On the other hand, if Kent County had one senator representing it in the Senate of Maryland as provided for in Senate Bill 8 this unfortunate situation — most injurious in my opinion to orderly and proper representative government — would be avoided. In short, so far as the Senate is concerned, it is difficult to have representative government without a representative.

The importance of local legislation in a consideration of reapportionment in Maryland appears in the Report to the Governor of Maryland of the Commission to Study Reapportionment of the General Assembly, filed January 31, 1964. There were two reports; the majority report recommended no changes in the existing Senate, and the minority report (or Hanson Report) recommended changes in the Senate, but recognized the vital importance of local legislation in Maryland and the desirability of having at least one senator from each political subdivision.

The Hanson Report was written by Professor Royce Hanson, Assistant Professor of Government at American University and who resided in Montgomery County. It was concurred in by other distinguished members of the Commission, *i.e.*, Samuel D. Hopkins, a resident of Baltimore City and a party to this suit; Dr. Roger Howell, a former Dean of the University of Maryland Law School, who resides in Baltimore City; Walter J. Bierwagen,

representing the AFL-CIO, who resides in Prince George's County and Helen L. Koss, second vice president of the Maryland League of Women Voters (an amicus curiae in the case at bar) who resides in Montgomery County.

In the Hanson Report the following was stated:

> *"Because of the significance of the counties and the City of Baltimore in the total scheme of government in Maryland, each county and the City should be assured of at least one representative in each house of the General Assembly. This assumes a voice for its corporate interest."* (Pg. 28)
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> "We should like to see the size of the House reduced to its traditional figure (123 members), but do not believe this is possible, without giving up the minimum of one delegate, the advantages of which are important *in a state with so heavy a burden of local legislation* or without apportioning the senate strictly on population." (Pg. 29)
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> * * * * * *
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> THE SENATE should be reapportioned to make possible its responsibility to a majority of the people, but it should be so designed to account for other factors which are not heavily weighted in the House. We recommend that the Senate contain 47 members apportioned on the basis of population, except that every county and the City should be guaranteed one senator, whatever its population. * * * Because of the rapid population growth and the need for greater flexibility we recommend the 47 seat Senate, thereby providing 23 senators representative of population alone and 24 as guaranteed representatives of the jurisdiction. * * * We also emphasize that if the Senate's side should fall below 41 members, it would be necessary to combine small counties to form senatorial districts in order to provide even marginal control of the Senate for the vast majority of the state's electorate. *We do not think this is desirable in a*

state with much local legislation to enact. It is not necessary if our recommendation is followed." (Pg. 30) (Emphasis supplied.)

Although some of the populous counties have adopted charters, the actual number of local bills has not significantly declined as the following table of bills referred to select committees will indicate:

	1963	*1957*	*1953*
"House	410	570	452
Senate	219	201	215
Total	529	771	667
Total All Bills	1865	1616	1500
Percentage of Bills Referred to Select Committees of All Bills Introduced	33.7%	47.7%	44.5%"

It is interesting to note that at the last Regular Session of the General Assembly in 1965 as shown by the index to the 1965 Laws of Maryland there were 18 bills enacted into law relating only to Kent County while there were but 15 such bills relating only to Cecil County.

In the study made by Professor V. O. Key, former professor of government at Johns Hopkins University and at Harvard University and a former president of the American Political Science Association, in his 1940 Report to the Legislative Council of Maryland entitled, "The Problem of Local Legislation in Maryland," he stated at page 1, Note 3:

> "The total of 509 local bills passed in 1939 must have entailed in the neighborhood of the same number of conferences with county commissioners, city officials, and other persons requesting the introduction of bills. Of the 509 bills passed, 173 were amended during the course of passage. It may be inferred that behind these amendments were conferences and discussions with local officials and other constituents desiring alterations in the bill as introduced."

The Supreme Court has always sustained the Maryland system of local legislation. See *Chappel Chemical and Fertilizer Co. v. Sulphur Mines Co.*, 172 U.S. 474, 19 S. Ct. 268, 43 L. Ed. 520 (1899) and more recently, *Salsburg v. Maryland*, 346 U.S. 545, 74 S. Ct. 280, 98 L. Ed. 281 (1954) in which the Supreme Court sustained the application of differing rules of evidence to different counties — a somewhat extreme example of local legislation. See also *McGowan v. Maryland*, 366 U.S. 420, 427, 537, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961).

It is significant to me that Professor Robert G. Dixon, Jr., Professor of Law at George Washington Law School and Graduate School of Public Law, is of the opinion that the preservation of the integrity of local political subdivisions is a legitimate basis for divergence from a population standard. His article "Apportionment Standards and Judicial Power," 38 Notre Dame Lawyer 367 (1963), indicates his position and this article was cited with approval in the majority opinion in *Reynolds v. Sims*.

See page 579 and note 60 of 377 U.S. Professor Dixon, in the same article, also stated at page 391:

> "[R]epresentation of each county in the legislature may be a practical necessity in those states such as Florida and Maryland where there is a custom of handling local governmental matters by 'special' legislation (more properly called public-local legislation) rather than by public-general legislation or county home rule."

A matter of vital importance to a political subdivision in having at least one senator is in connection with the requirement in the Maryland Constitution that the Governor's appointments of various local officials be confirmed by the Senate. For example, the trial magistrates, the Liquor License Commissioners and other local officials of this type must have senatorial confirmation. The senator representing the local political subdivision involved has in almost all cases the "veto" power over a gubernatorial

appointment of such a local official. That senator represents the *local* opinion in regard to the qualifications and desirability of the appointee. That opinion is important for the proper administration of local government and the local political subdivision involved should have a representative in the Senate for the performance of this important function.

Then too, scholarships to various educational institutions are allocated to the members of the Senate for appointment. Although generally there are examinations given to determine the general availability of students in the political subdivision for the awards, the ultimate selection from those receiving the highest grades, rests with the senator. It is unrealistic to suppose that many scholarships will be allocated to students from unrepresented counties in the Senate created by Senate Bill 5. Although I think it is unfortunate that courts are now required to enter this generally unwanted portion of the political arena, I think that in exercising our new judicial function we should not be politically naive. We must face and carefully consider the political realities involved; we cannot depend upon simple arithmetic.

Another important consideration which supports — in Maryland particularly — the concept of giving each political subdivision one senator in the upper house of the bicameral legislature, is to insure that the electorate of each political subdivision has a *voice* in the deliberations of that house. Maryland is unusually diversified in topography, climate, natural resources and in its economy. For example, the *only* ocean frontage, ocean park areas and ocean recreational areas are located in Worcester County. The center of the oyster and crab industry is in Somerset County. The electorate and their representatives from these two counties would have an appreciation of the problems and legislative needs arising from these local situations which no other electorate or representative could have. It is quite unlikely that either of these counties will ever have a State Senator in Senatorial District 16 set up by Senate Bill 5 as Worcester County has only approximately 20%

and Somerset County only approximately 15% of the total population of District 16 (122,072 in the 1960 census) as contrasted with approximately 40% and 25% respectively of that total population in Wicomico County and Dorchester County. In short, the two senators from District 16 are most likely to come from Wicomico and Dorchester Counties which have approximately 65% of the population. But in my opinion it furthers a rational State policy to provide that these two smaller counties *should have a voice* of their own in the Senate of Maryland, not only to protect their own local interests but, perhaps more importantly, to give the entire Senate the facts and local point of view in regard to those important parts of the whole economy of the State. We should not lightly assume that the Supreme Court, which has shown such zeal in protecting the rights of minorities, will now rule that a minority of voters *will not even be permitted to be heard* in the upper house of the Maryland bicameral legislature. It is one thing to say that a minority shall not rule; it is quite another thing to say that it shall not be heard.

VI.

The Supreme Court, however, has indicated that even though representation of political subdivisions may be the result of a clearly rational state policy, this policy cannot submerge population as the controlling consideration in the apportionment of seats in the particular legislative body. Is population submerged as the controlling consideration in the apportionment of seats in the Senate of Maryland by Senate Bill 8? It seems clear to me that it is not.

It has already been observed that except for the allocation of the one senator for each political subdivision, a total of 24 senators, the remaining 29 seats of the 53 member Senate are allocated on a basis of population based on the rule of equal proportions. Well over one-half of the 53 senate seats are thus apportioned on the basis of population. The 5 most populous political subdivisions not only control a majority of the Senate seats but more than the 60% of the voters required to amend the Maryland Con-

stitution, pass emergency legislation or override a veto. It seems obvious that not only is the principle of population in apportioning seats *not submerged*, but it is *dominant and completely effective in its control of the Senate provided for in Senate Bill 8.*

It should be pointed out that the provisions of Senate Bill 8 in regard to the apportionment of Senate seats give substantially greater recognition to the principle of population than was recommended in the Report of the Committee on Congressional Redistricting and Legislative Apportionment, dated November 17, 1964. This Committee of the Legislative Council of Maryland consisted of 18 highly qualified members of the General Assembly of Maryland (9 from the Senate and 9 from the House of Delegates). Senator William S. James, President of the Senate was Chairman and Delegate Marvin Mandel, Speaker of the House of Delegates was vice-chairman. This able Committee recommended a Senate of 47 members in which the 5 more populous political subdivisions (Baltimore City, Baltimore County, Prince George's County, Montgomery County and Anne Arundel County) were allocated 28 seats and the remaining 19 counties were given one senator each, a total of 19 senators. Under this recommended Senate the 5 most populous political subdivisions received 59.57% of the total number of seats. In the Senate provided for in Senate Bill 8, the same 5 more populous political subdivisions received 64.15% of the total number of seats. The Committee clearly recognized the principle that each political subdivision should have at least one senator in the Maryland Senate.

The Supreme Court has not established any mathematical formula for determining degrees of disparity between the population of districts. It would be impracticable to do this based on a particular census. In any event, such a basis would have little enduring effect in a State with as rapidly growing a population as in Maryland; the mathematical basis would have little reality in a few years or even in several months. It should be kept in mind also that population, although possibly reflecting *generally* the prob-

able number of qualified voters in one district as compared with another district, does not *automatically reflect the number of qualified voters* as the number of children who have not reached voting age in a fast growing community will be counted in the "population" of that district, but will not really reflect the electoral strength of that district *vis a vis* a slow growing and older district having proportionately more qualified voters. In short, a purely mathematical formula is neither desirable nor feasible for application in reapportionment problems. See Professor Davis, "Apportionment Standards and Judicial Power", 38 Notre Dame Lawyer, 367 at pages 381-386.

When the total number of representatives in both the Senate and the House of Delegates provided for in Senate Bill 8 are considered together — which is a legitimate approach to a reapportionment problem — see 377 U.S. 577 and see also Professor Davis, *supra*, at page 390 of 38 Notre Dame Lawyer, the dominance of the population principle is clearly seen.

It is apparent that the Senate Bill 8 reapportionment of both the House of Delegates and the Senate follows in general the recommendations of the Hanson Report, although in the Hanson Report a Senate of 47 members with one representative in each house guaranteed to each political subdivision was recommended, whereas there is a 53 member Senate provided for in Senate Bill 8. It is interesting to note, however, that the Senate provided for in Senate Bill 8 gives Baltimore City and the 4 suburban counties a greater proportion of legislative power than did the plan recommended by the Hanson Report.

On page 20 of the Hanson Report, Professor Hanson described the method used in determining the allocation of legislative power, as follows:

> "If we devise a means of measuring legislative power as a rough test of the total system of representation, the situation is even more clearly shown. Since the representative power is equally divided between the two houses, half the power is in each. Thus a unit's

total legislative power is represented by ½ its percentage of the total membership of one house added to ½ its percentage of its membership in the other.[8] (Footnote 8 — A full explanation of this method can be found in Alan L. Clem, 'Measuring Legislative Malapportionment: In Search of a Better Yardstick,' *The Midwest Journal of Political Science*, VII, 125-144 (1963).

"The Hanson report recommendations compare with the distribution of legislative power under Chapter 3 as follows:

	Hanson Report				Senate Bill 8 Plan		
	% *Pop.*	% *Del.*	% *Sen.*	% of *Leg. power in both houses*	% *Del.*	% *Sen.*	% of *Leg. power in both houses*
Baltimore City	30	27	21	25	30	23	26
4 Suburban Counties	45	38	36	37	44	42	43
9 Medium Counties	17	20	21	21	18	17	17
10 Small Counties	8	14	21	18	8	19	13

(Discrepancies in totals due to rounding.)"

In connection with the thought that the legislative process is to be considered as a whole in deciding reapportionment cases, I am of the opinion that an additional factor is to be considered, i.e., that Maryland is a "strong Governor" State. Not only does the Governor in Maryland have the usual veto power (which is a part of the legislative process designed to creat a check upon ill considered legislation, see Article II, Section 17) but by Article III, Section 52 of the Maryland Constitution the Governor not only formulates the State Budget, but the General Assembly may not increase it unless it provides the necessary taxes to meet the increased expenditure. The history of this beneficent amendment to the Maryland Constitution in 1916 is set forth by Chief Judge Sobeloff,

for the Court, in *McKeldin v. Steedman*, 203 Md. 89, 97, 98 A. 2d 561, 564 (1953). Chief Judge Sobeloff stated:

> "The heart of the scheme, as stated by the Goodnow[13] Commission, is 'to impose upon the Governor the sole responsibility * * * of presenting to the legislature a complete and comprehensive statement of the needs and resources of the State * * *; to make it impossible for the legislature so to change the plans proposed by the Governor as to produce a deficit; but, to permit the legislature to make provision for any purpose not included in the Governor's plan on the condition that it provide for the revenue which the accomplishment of its purpose necessitates.'"

The Governor, by Article II, Section 17 of the Maryland Constitution is given the power to veto *items* in any bill making appropriations.

These constitutional provisions and the various statutes implementing the formulation of the State budget and fiscal policy by the Governor give him a dominant position in the fiscal policy of the State not usually enjoyed by the Chief Executive of a State, but more usually performed by the legislature itself. This most important participation by the Governor, who is elected by the electorate at large throughout the State, in the legislative process is, to my mind, an added reason why some — but not dominant — representation should be given the smaller political subdivisions so that they will not be completely overwhelmed by the dominant majority. Indeed the power of the Governor who must depend upon the majority of voters State-wide, is such that *in the final analysis* (although sometimes temporarily delayed) the will of the majority has in fact been effective in Maryland even before the present constitutional requirement to reapportion became a part of the constitutional law of the United States.

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[13] Dr. Frank J. Goodnow, then President of the Johns Hopkins University, was its chairman and among its distinguished members was F. Neal Parke, later a member of the Court of Appeals.

It is clear to me that under the provisions of Senate Bill 8 population is not submerged. In my opinion, Senate Bill 8, now Chapter 3 of the Laws of Maryland (Special Session, October 1965) should have been declared constitutional, valid and effective by the Chancellor and I would reverse his decree to the contrary.

I am authorized to state that Judge Horney concurs in the views here expressed.

MANDATE

Court of Appeals of Maryland

September Term, 1965

No. 487

Harry R. Hughes, et al.,

v.

Maryland Committee for Fair Representation, et al.

Appeal from the Circuit Court for Anne Arundel County.

Filed: January 3, 1966

January 11, 1966—Decree affirmed. Opinion to follow. Per Curiam Order filed.

March 2, 1966—The majority previously directed a Per Curiam Order sustaining the order of the trial court. We add to that order that the trial court retain jurisdiction at least until after the 1966 General Elections; and that appellants pay the costs. Opinion by Prescott, C.J. Horney and Barnes, JJ. dissent.

March 2, 1966—Dissenting opinion by Barnes, J. in which Horney, J. concurs.

APPENDIX C

Minority Report of Governor's Commission on Reapportionment, 1964.

Minority Report

by

Royce Hanson, Walter J. Bierwagen, Samuel Hopkins, Roger Howell, and Helen L. Koss*

Our views stem from a basic disagreement with the Commission report.

I. *Summary and Recommendations*

1. *The report is made in unnecessary haste.* The Commission last year requested a delay of its report until the Supreme Court could decide the cases before it and establish constitutional guidelines. The conditions which justified that delay still exist. We have no desire unnecessarily to postpone action. Neither do we wish to advise action which may result in an unconstitutional apportionment, forcing the General Assembly to reapportion itself only to have to do it again within a few months.

2. The Commission failed even to consider the relationship of its recommendations for the House of Delegates to the composition of the State Senate. The result is a small House with almost half its membership allocated without regard to population. With the Senate unchanged, a minimum allotment of two delegates per county and twelve for the City is unreasonable, unrealistic, impractical, and, we feel, unconstitutional.

3. The Commission has therefore failed in its purpose of studying the apportionment problem of the State and devising a permanent plan to constitutionally meet this problem. There has been no study to determine the need for districts, or to determine the wisdom of minimum allotments of delegates and senators to counties, to find the best

* Dr. Furman L. Templeton is in substantial agreement with this minority report.

means of representing all the vital interests of the people of the State, or even to determine the constitutional bounds within which an apportionment must be made. Its proposal is neither complete nor permanent.

4. We therefore recommend:

a. That the report of the Commission and the minority report be withheld pending the resolution of the Maryland case now before the Supreme Court of the United States, and that the Governor recommend to the legislature no action on apportionment until that case is decided.

b. If, however, the Governor feels some action is desirable at the 1964 session, he recommend a general constitutional amendment which merely authorizes statutory apportionment and establishes procedures and criteria which are flexible enough to meet any of the alternatives which might be required by judicial interpretation of the Fourteenth Amendment.

c. That after the Court has spoken, the proposal of the minority and that of the majority be reconsidered by the Governor and by this Commission, if he sees fit to extend its life, and within 30 days of that decision a permanent plan be presented for statutory enactment at the 1965 session of the General Assembly.

d. That the Governor oppose the passage of the majority plan or any other specific plan at the 1964 session unless all reasonable doubts as to its constitutionality can be erased, or the Court decides the Maryland case in time for action at the session or at a one-day special session at the conclusion of the regular session.

The remainder of this report consists of the sort of discussion and amplification of the reapportionment problem in Maryland and the above recommendations which we believe the majority should have presented.

II. *The Reapportionment Picture in Maryland*

On April 24, 1962, the Maryland Court of Appeals held that Maryland Courts had jurisdiction of apportionment questions.[1] One month later, the Circuit Court of Anne Arundel County voided Article III, Section 5, of the Maryland Constitution relating to the apportionment of the House of Delegates.[2] Immediately thereafter, the General Assembly in special session enacted a stop-gap apportionment statute to provide for the 1962 general elections.[3] It rejected a constitutional amendment to provide for a permanent apportionment of the House of Delegates.[4] A permanent statutory plan was also eliminated from the stop-gap law.

The stop-gap law was passed under considerable need for haste, since it had to be enacted before May 31. The apportionment formula in that bill provided for a House of 123 members, with two members allocated automatically to each of the 23 counties and six legislative districts of Baltimore. The remaining 65 members were allocated on the basis of population to the counties and legislative districts.

Application of this formula resulted in the shift of 19 seats from smaller counties to the larger counties and city districts. The stop-gap law provided, however, that for the 1962 elections (since the primary had already been held) only the increases would be applied. No county lost representation. This expanded the size of the House to 142 members for the four years, 1962-1966.

As originally drafted, the stop-gap bill (H.B. 1) provided for reversion to a House of 123 members in 1966, and the loss of 19 seats by the smaller counties. This is the section which was eliminated from the Act as finally passed.

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[1] *Maryland Committee for Fair Representation v. Tawes,* 228 Md. 412; 180 A. 2d 656.

[2] *Maryland Committee for Fair Representation v. Tawes,* No. 13,920 Equity, Circuit Court of Anne Arundel County, May 1962.

[3] Chapter I, *Laws,* Extraordinary Session of 1962.

[4] H.B. 2, Extraordinary Session, 1962.

In place of the permanent section, new language was substituted providing (1) that the stop-gap law would expire upon an enactment of a constitutional amendment, (2) that if an amendment is rejected in 1964, then the act will also expire (but is unclear whether in 1966 or 1970), and (3) that if the act expires through rejection of an amendment, the House will revert to its composition in January 1962.

The last is an impossible result, since the January 1962 composition of the House was held to be unconstitutional. While the act contemplates a constitutional amendment in 1964, that is not necessary. The act is a simple statute and may be superseded by a simple statute as well as by an amendment.[5]

So far as the House alone is concerned, then, either a constitutional amendment in 1964 or a statute in 1965 can adequately and legally handle the problem. Action is necessary before the filing date for the 1966 elections. If no positive action is taken, there will be no constitutional apportionment of the House, and therefore no House to elect in 1966. The old (1962) apportionment is clearly unconstitutional. There can be little doubt that an extension of the stop-gap legislation would also fail to meet constitutional standards. On these points, the Commission seems to be in general agreement.

The question of the State Senate is more difficult. In July 1962, the Court of Appeals upheld by a vote of four to three the constitutionality of the existing apportionment of the State Senate.[6] That decision was appealed to the Supreme Court of the United States and oral argument was heard by that Court in November 1963. A decision on the case may be anticipated by the conclusion, in June 1964, of the current term of the Court. Because of the uncertainty of the status of the Senate as a result of this

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[5] *MCFR v. Tawes,* 228 Md. 412.

[6] *MCFR v. Tawes,* 229 Md. 406; 184 A. 2d 715 (1962).

uncompleted litigation, the Governor last year granted this Commission's request to delay its final report.[7]

The majority is technically correct in its assumption that the Court of Appeals decision is still the law. That is not in question. The issue is twofold: (1) Whether, when a dispositive decision on the question is at hand, the long and arduous process of constitutional amendment should be set in motion with so much uncertainty as to the ultimate constitutionality of the proposed amendment; and (2) whether the Commission should in any event even consider the question of Senate apportionment.

On the first matter, we of the minority feel that since the Maryland Court of Appeals decision represents the view of a minority of those courts which have ruled on similar, even identical, questions, and since a final decision is but months, perhaps but weeks, away, it is little short of folly to urge on the legislature an amendment which may be (a) incomplete, having made no consideration of the Senate question, (b) unconstitutional by virtue of its violation of guidelines on the apportionment of a single house which are also now being considered by the Supreme Court and the announcement of which are expected at the same time as the decision in the Maryland case. Finally, (c) an amendment such as the Commission submits does not just assume the constitutionality of Senate apportionment; it seeks to ignore Senate apportionment entirely and propose a house plan in a self-imposed vacuum. Thus, such an amendment runs the danger, whatever the Supreme Court decides about the Senate *per se*, of being an unwise as well as an unconstitutional distribution of representation.

As to the second matter of disagreement, the minority feels that in the first instance it is impossible to consider the apportionment of one house of the legislature without reference to the composition of the other. To do so makes no sense from the point of view of the theory and practice of representative government. Nor does it make sense from the point of view of constitutional law.

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[7] Address of the Governor to the General Assembly, January 1963.

It has been recognized from the time of the origin of the theory of bicameralism that the system of representation in one house must be considered in relationship to the system of representation or the interests represented in the other. Lords were not admitted to Commons and in early times if one house represented property, the other was clearly to represent people.

The "federal analogy" which is used to defend the present Maryland system makes the assumption that one house "of course" must be based on population if the other is to represent "area" or jurisdictions. The State so argued before the Supreme Court last November. Numerous state and federal courts have held that *at the very least* the Fourteenth Amendment requires that one house is based on population and no other basis, if a substantial deviation from population is to be permitted in the other. In state after state apportionments have been declared unconstitutional which result in less deviation from population than that resulting from the majority proposal. In no case currently before the Supreme Court has a state defended its apportionment except as the houses relate to each other, and in every case even the defense has conceded that at least one house should be based entirely on population.

III. *Analysis of the Commission Proposal*

We feel that the only sound approach is to recognize that there is a representative relationship between the two houses and to proceed on that basis. This permits a rational discussion of alternatives. Let us assume, for instance, that the Supreme Court upholds our Court of Appeals, and thus there can be no change in the Senate as a practical matter. Then the apportionment of the House must reflect that condition. We have no objection to the submission of an amendment based on that assumption, especially if it turns out to be a correct one. But the report does not make that assumption. It makes no assumptions at all about Senate representation. The result is a plan which so over-represents the smaller counties in relation to the middle sized and larger counties as to cast its constitutionality into grave doubt.

TABLE I

ANALYSIS OF COMMISSION PROPOSAL

(House of 123, minimum of 2 for each County or Legislative District)

	% Population	No. Delegates	% Delegate	No. Senators	% Senator
Baltimore City	30	33	27	6	21
4 Suburban Counties	45	40	33	4	14
9 Medium Counties	17	30	24	9	31
10 Smallest Counties	8	20	16	10	34
TOTAL	100	123	100	29	100

Table I shows the extent of the distortion. If we devise a means of measuring legislative power as a rough test of the total system of representation, the situation is even more clearly shown. Since the representative power is equally divided between the two houses, half the power is in each. Thus a unit's total legislative power is represented by ½ its percentage of the total membership of one house added to ½ its percentage of its membership in the other.[8] Table II shows the relationship of legislative power to population which results from the majority proposal.

TABLE II

RELATIONSHIP OF LEGISLATIVE POWER TO POPULATION UNDER THE MAJORITY PROPOSAL

	% Population	% of Total Legislative Power in Both Houses
Baltimore City	30	24
4 Suburbs	45	24
9 Medium Counties	17	28
10 Smallest Counties	8	25
	100	101*

* Total results from rounding.

[8] A full explanation of this method can be found in Alan L. Clem, "Measuring Legislative Malapportionment: In Search of a Better Yardstick," *The Midwest Journal of Political Science*, VII. 125-144 (1963).

The Court of Appeals has ruled in its original decision that "there must be some reasonable relationship of population, or eligible voters, to representation in the General Assembly if an apportionment is to escape the label of constitutionally-prohibited invidious discrimination."[9] No dispassionate analysis of the Commission plan can make it reach that standard, which *is the law of Maryland*, whatever the outcome of the pending case. With 25 per cent of the population, the smaller counties would exercise 53 per cent of the State's legislative power.

We conclude that the majority plan does not meet general standards of good representation, it does not meet standards deducible as minima from the weight of cases decided, it does not meet the assumptions of the State's own attorneys defending the composition of the Senate, and it does not meet the standards of the existing, unchallenged case law of apportionment in Maryland.

The authors of the Commission report pretend to be friends of the *status quo* in the Senate. In fact they are its worst enemies, for the plan they present destroys the last vestige of logical defense for the malapportionment of that body. If the majority plan is adopted, its constitutionality can be salvaged only by apportioning the Senate on the basis of population alone. In a Senate of 29 members, this would reduce the Senate representation of the 10 smallest counties to two senators, and the nine medium counties to four senators, with 10 going to the City and 13 to the suburban counties.

Even with a Senate based entirely on population, a minimum of two delegates in a House of 123 members tends to raise possible constitutional objections.

Under the present stop-gap arrangement, the 76 per cent of the people living in the City and four largest counties have 56 per cent of the representation in the House of Delegates. Under the Commission proposal, they would receive only 59 per cent. Even if the House were apportioned on the same formula used by the U. S. House

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[9] *MCFR v. Tawes*, 180 A. 2d 656, 668.

of Representatives, but a minimum of two delegates were guaranteed, 76 per cent of the people could obtain but 66 per cent of the Delegates. If a House of 123 members is desired, the minimum must be reduced to one member for each jurisdiction and the major fractions formula used by the U. S. Bureau of the Census in calculating the apportionment of the U. S. House of Representatives should be applied. Appendix C of this minority report compares the Commission formula with the U. S. Formula. The data in the appendix were supplied the Commission during its deliberations.

IV. *An Alternative Proposal*

We do not object to the submission of a proposal to reapportion the House based on the assumption of the Senate remaining unchanged. While we think it is unwise to do so, we would recognize the desire to assure the State of a constitutional apportionment of the House. Given the law — the existing law — on the subject, we believe that a House of 123 members, apportioned entirely on the basis of population would be the only certain constitutional complement to the Senate. This does not mean, however, that we think this alone would obviate the need for Senate apportionment, or save it from challenge. Given the present situation, whatever the Senate decision, we feel certain that a House of 123 members apportioned on the basis of population, without regard to any other factor, would be constitutional. We do not, however, favor so extreme a result.

For that reason, the alternative we see as feasible, and also constitutional, is to keep the House at 142 members and to guarantee a minimum of one delegate to each county and to the City of Baltimore. As tables III and IV show, this formula results in a far more fairly apportioned House than the Commission proposal.

TABLE III

Comparison of Minority and Majority House Plans

	Minority Plan: 142 Members Minimum of 1	*Majority Plan: 123 Members Minimum of 2*
Allegany	4	4
Anne Arundel	8	7
Baltimore	19	13
Calvert	2	2
Caroline	2	2
Carroll	3	4
Cecil	3	3
Charles	2	2
Dorchester	2	2
Frederick	4	4
Garrett	2	2
Harford	4	4
Howard	2	2
Kent	2	2
Montgomery	13	10
Prince George's	14	10
Queen Anne's	2	2
St. Mary's	2	2
Somerset	2	2
Talbot	2	2
Washington	4	4
Wicomico	3	3
Worcester	2	2
Baltimore City	39	33
Totals	142	123

TABLE IV

ANALYSIS OF MINORITY PLAN[a]

(House of 142, Minimum of One)

	% Population	*Delegates*	*% Delegates*
Baltimore City	30	39	27
4 Suburban Counties	45	54	38
9 Medium Counties	17	29	20
10 Smallest Counties	8	20	14
	100	142	99*

(a) The formula used is that of adjusted population ratio. Other formulae will produce different results. This formula was chosen, not because it is best, but because it most nearly resembles that used in the Commission proposal.

* Total results from rounding.

TABLE V

RELATIONSHIP OF LEGISLATIVE POWER TO POPULATION UNDER THE MINORITY PROPOSAL

	% Population	% of Total Legislative Power in Both Houses
Baltimore City	30	25
4 Suburban Counties	45	26
9 Medium Counties	17	25
10 Smallest Counties	8	24
	100	100

Should the Senate ultimately have to be reapportioned, we believe this gives room there to retain a Senator for each county, adding members to accommodate population growth. Table V indicates two things. One is that a balance between the four groups of jurisdictions is struck in terms of total legislative power. Each has roughly ¼ of the total strength. While interesting, this may not be material. What remains apparent is the second matter — that Senate malapportionment still results in substantial disparities in legislative power. Without reapportioning the Senate itself, the only way to reach a more reasonable relationship to population would be to overrepresent urban areas in the House to the same extent they are underrepresented in the Senate, and reverse the treatment for th smaller counties. No one seriously advocates this.

To recapitulate, we think that if an amendment on the House must be submitted in 1964, the minority proposal will meet the constitutional tests and will obviate the danger that in any future reapportionment of the Senate the tradition of a minimum of a Senator from each county must be abandoned. A smaller House than 142 or a larger minimum than one will not assure so salutary a result.

V. *A Permanent Solution for the Reapportionment Problem*

Now we turn from the question of the expedient to what we consider the proper function of the Commission:

the development of a permanent proposal for reapportionment of the General Assembly. We proceed to this task because we feel an obligation to present a well conceived plan capable of meeting the constitutional standards which may be anticipated and adapted to the problem of effective representative government in Maryland.

To develop such a plan, we find as fundamental the following propositions:

1. Apportionment of both houses, and of the legislature as a whole, must bear a reasonable relationship to population.[10] Population is the starting point, and deviation from population, while permissible, must be justified as consistent with equal protection standards.[11]

2. The principles of representative government require that as a minimum condition, the apportionment must permit a substantial majority of the people to elect a majority of the lawmakers. It is not enough that the majority be able to prevent its abuse by a minority. The majority must have the power to rule within constitutional bounds.[12]

3. The "Federal Analogy" is inapposite for state government in establishing a system of representation.[13]

4. There are three apportionment traditions of material importance in Maryland:

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[10] Here we rely on the weight of existing court decisions and learned articles on this subject. This view is buttressed by that of the Advisory Commission on Intergovernmental Relations, *Apportionment of State Legislatures* (U. S. Govt. Printing Office, 1962). See especially Chapter V, "Principles for Consideration and Use of Governors, Legislators and State and Federal Courts," pp. 59 ff.

[11] These standards, stated briefly, are: 1. The deviations must be for a permissible state purpose. 2. Classifications must be made only pursuant to a rational policy and must not result in "invidious discrimination." 3. Persons in the same class may not be treated differently from others similarly situated.

[12] *Sincock v. Duffy*, 215 F. Supp. 169, U.S. D.C. (Del., 1963). Oral argument heard Dec. 9, 1964, U.S. S.C. Oct. Term, 1963, No. 307.

[13] *Gray v. Sanders*, 372 U.S. 368 (1962); *Mann v. Davis*, 213 F. Supp. 577 U.S. D.C. (E.D. Va., 1962).

a. The guarantee of minimum representation for each county.

b. The recognition of population in assignment of senators to Baltimore City.

c. Where more than one Senator is allocated to a jurisdiction, it should be divided into legislative districts.

5. Where minimums are permitted, the house concerned must be of sufficient size to prevent unreasonable distortion of the representation-population ratio.

6. In the City of Baltimore and the large counties, the heterogeneity of the population, the diversity of occupations and interests and the sheer size of the population and therefore the number of its representatives make elections at-large infeasible and probably undesirable.

7. Because of the significance of the counties and the City of Baltimore in the total scheme of government in Maryland, each county and the City should be assured of at least one representative in each house of the General Assembly. This assures a voice for its corporate interests.

8. No plan can be sustained for either house which is not uniform throughout the State or which provides advantages to people in one jurisdiction not provided in another.

9. As a working rule, the size of the Senate should not exceed ⅓ that of the House. Given these principles, a number of plans are possible. We present what we think on balance is preferable for a state like ours.

THE HOUSE OF DELEGATES should be composed of 142 members, apportioned on the basis of population, except that each county and the City of Baltimore would be guaranteed one (1) Delegate.[14] Thus, 118 Delegates would

[14] We do not believe that in the initial allocation of seats there is any justification for guaranteeing Baltimore City six and the large counties only one. The total result is the same now, but in time could be different. There is no sense in raising a constitutional question where there is no need of it.

be apportioned on population alone. We recommend the use of an adjusted population ratio formula for the apportionment. While there are more desirable formulae, this one is readily understood and quite adequate for apportioning so small a house. We are acutely aware of the arguments for reducing the size of the House to 123 members. We should like to see the size of the House reduced to its traditional figure, but do not believe this is possible, without giving up the minimum of one Delegate, the advantages of which are important in a state with so heavy a burden of local legislation, or without apportioning the Senate strictly on population.

THE SENATE should be reapportioned to make possible its responsibility to a majority of the people, but it should be so designed to account for other factors which are not heavily weighted in the House. We recommend that the Senate contain 47 members apportioned on the basis of population, except that every county and the City should be guaranteed one Senator, whatever its population. This requirement so overrepresents the small counties that at least seventeen seats must be added to make majority control possible. Because of the rapid population growth and the need for greater flexibility, we recommend the 47 seat Senate, thereby providing 23 senators representative of population alone and 24 as guaranteed representatives of the jurisdictions. We emphasize that this leaves a heavy bias toward the small counties as Table VI shows. We also emphasize that if the Senate's size should fall below 41 members, it would be necessary to combine small counties to form senatorial districts in order to provide even marginal control of the Senate for the vast majority of the State's electorate. We do not think this is desirable in a State with much local legislation to enact. It is not necessary if our recommendation is followed.

Taking the proposals for the two houses jointly, this plan would take a far less heavy toll of incumbent members, while offering a far more equitable system of representation than that proposed in the Commission report. As shown in Table VII, the relationship of representation to population makes possible majority rule, but still affords

substantial representation beyond population requirements for small counties.

DISTRICTS. We propose that the City of Baltimore and any county entitled to more than one senator be divided into as many legislative districts as it has senators, with the Delegates divided as equally as possible among these same districts. We feel that Senators and Delegates should be nominated and elected within these districts. This would permit the representative system more accurately to reflect the diversity of our large population centers, insure some seats to the minority party, and enhance contact between the voters and their representatives.

TABLE VI

APPORTIONMENT OF THE HOUSE AND SENATE
UNDER PERMANENT PROPOSALS
OF THE MINORITY

	% *Population*	*House*	% *Delegate*	*Senate*	% *Senate*
Baltimore City	30	39	27	10	21
4 Surburan Counties	45	54	38	17	36
9 Medium Counties	17	29	20	10	21
10 Smallest Counties	8	20	14	10	21
TOTALS	100	142	99*	47	99*

* Total results from rounding.

TABLE VII

RELATIONSHIP OF LEGISLATIVE POWER TO POPULATION
UNDER PERMANENT PROPOSALS
OF THE MINORITY

	% *Population*	% *of Total Legislative Power in Both Houses*
Baltimore City	30	25
4 Suburban Counties	45	37
9 Medium Counties	17	21
10 Smallest Counties	8	18
TOTALS	100	101*

* Total results from rounding.

We recommend that the districts be drawn in such a manner that they do not deviate more than 10 per cent in population within any given jurisdiction. Where the number of delegates is such that it cannot be evenly divided among the districts, those districts with the most rapid rate of population growth should be given the larger number of delegates.

IMPLEMENTATION. This proposal should be implemented in two steps.

1. A general constitutional amendment should be enacted for submission to the people in either 1964 or 1966. This amendment should contain the basic criteria for apportionment and provide the procedure for its accomplishment following each federal decennial census of Maryland.

Specifically, the amendment should vest the power to apportion by statute in the legislature. If the legislature does not act, apportionment should become the duty of the Secretary of State. The amendment should specify the size of the houses, minimum guarantees in each, and the use of the population standard for the number to be apportioned. It should permit the establishment of legislative districts, and establish criteria for their creation.

It is our strong suggestion that this amendment be submitted at the 1966 general elections. This would permit its evaluation in light of the decisions of the Supreme Court. We do not anticipate the need for revisions, but there is no reason to proceed without such review. A draft amendment of the sort described is contained in Appendix A of this minority report.

If it is deemed necessary to submit an amendment at the 1964 session, a more generalized version appears in Appendix B. That draft is more permissive and is drawn in language designed to afford maximum flexibility to the General Assembly in meeting such legal requirements as may arise without the need for a new constitutional amendment.

2. A statute, containing the permanent plan proposed above should be enacted at the 1965 session of the legislature. It would thus govern the 1966 elections at which the amendment would be submitted. The latter is legally unnecessary, but provides constitutional protections for the small counties, thus seems desirable if the system is to be stabilized.

The statute could be re-enacted after adoption of the amendment, or be worded to make re-enactment unnecessary. We favor the use of a statutory plan pursuant to an amendment to keep the Constitution uncluttered and to permit minor improvements in such matters as districting or in specific formulae without the necessity of full scale constitutional amendment. The lessons of the apportionment battle this report hopefully closes should at least caution us against freezing either too much or too little into the Constitution itself.

VI. *Conclusions*

For four long and contentious years our State has been troubled by its chronic malapportionment. The history of legislative action has been one of too little, too late. The majority report is, unfortunately another episode in this dreary performance. Because it is based at best on hunch, and trusts entirely to luck for both its adoption and legal survival, we of the minority have set forth our views in detail. We seek here to do what this Commission had the opportunity to do — at last to provide intelligent, considered leadership toward solution of a most perplexing problem fundamental to the vitality and capacity of State government. We have stated our views in the hope that when the inevitable day of reckoning for this subject has been reached, your excellency will be provided with a suitable, constitutional, and practical proposal and the support necessary to speed its enactment.

MINORITY REPORT

Appendix A

Proposed Amendment to Provide Reapportionment Procedure

(For submission in 1966)

Amendment to Article III to read as follows:

Section 2. The membership of the House of Delegates shall consist of 142 Delegates. Each county and the City of Baltimore shall be entitled to a minimum of one Delegate. The remaining number of Delegates shall be apportioned among the several counties and the City of Baltimore on the basis of population.

Section 3. The membership of the State Senate shall consist of 47 Senators. Each county and the City of Baltimore shall be entitled to a minimum of one Senator. The remaining number of Senators shall be apportioned among the several counties and the City of Baltimore on the basis of population.

Section 4. The General Assembly shall, at the first regular session subsequent to the adoption of this amendment, and thereafter at the first regular session subsequent to the publication of the federal decenniel census of the population of Maryland, enact a plan of apportionment consistent with this article and the requirements of the Constitution and laws of the United States. If the General Assembly adjourns *sine die* without complying with this section, the Secretary of State shall within thirty days promulgate a plan of apportionment consistent with this Article and with the requirements of the Constitution and laws of the United States. Such plan shall govern the next ensuing election of Delegates and Senators.

Section 5. The General Assembly may provide by law for the establishment of legislative districts for the election of Senators and Delegates in the City of Baltimore and in all counties which shall be entitled to more than

one Senator in such plans of apportionment as it shall enact pursuant to this article. All such districts shall be composed of contiguous territory, shall be compact in form and their respective populations shall not vary in population by more than ten per cent from the mean population for such districts in the respective counties in which they are established, or in the City of Baltimore.

APPENDIX D

STATES ARRANGED IN ORDER OF NUMBER OF POLITICAL SUBDIVISIONS, COUNTIES, PARISHES AND INDEPENDENT CITIES

(Compiled from Rand McNally Cosmopolitan World Atlas)

Texas	254	New York	62
Georgia	159	California	58
Virginia	140	Montana	56
Kentucky	120	West Virginia	55
Missouri	115	North Dakota	53
Kansas	105	South Carolina	46
Illinois	102	Idaho	44
North Carolina	100	Washington	39
Iowa	99	Oregon	36
Tennessee	95	New Mexico	32
Nebraska	93	Utah	29
Indiana	92	Alaska	24
Ohio	88	Maryland	24
Minnesota	87	Wyoming	23
Michigan	83	New Jersey	21
Mississippi	82	Nevada	17
Oklahoma	77	Maine	16
Arkansas	75	Vermont	14
Wisconsin	72	Massachusetts	14
Alabama	67	Arizona	14
Florida	67	New Hampshire	10
Pennsylvania	67	Connecticut	8
South Dakota	67	Hawaii	5
Louisiana	64	Rhode Island	5
Colorado	63	Delaware	3

STATES ARRANGED IN ORDER OF RATIO OF NUMBER OF SEATS IN UPPER HOUSE TO NUMBER OF POLITICAL SUBDIVISIONS, 1964

STATE	SENATE SEATS	SUB-DIVISIONS	RATIO
Rhode Island	46	5	9.2
Delaware	17	3	5.7
Hawaii	25	5	5.0
Connecticut	36	8	4.5
Massachusetts	40	14	2.8
New Hampshire	24	10	2.4
Maryland (ch. 3)	53	24	2.2
Vermont	30	14	2.1
Maine	34	16	2.1
Arizona	28	14	2.0
Washington	49	39	1.3
Wyoming	27	23	1.2
Montana	56	56	1.0
South Carolina	46	46	1.0
Idaho	44	44	1.0
New Mexico	32	32	1.0
New Jersey	21	21	1.0
Nevada	17	17	1.0
New York	58	62	.9
North Dakota	49	53	.9
Utah	25	29	.8
Alaska	20	24	.8
Minnesota	67	87	.8
Oregon	30	36	.8
Pennsylvania	50	67	.7
California	40	58	.7
Florida	43	67	.6
Illinois	58	102	.6
Louisiana	39	64	.6
Mississippi	52	82	.6
Oklahoma	44	77	.6
West Virginia	32	55	.6
Alabama	35	67	.5
Colorado	35	63	.5
Indiana	50	92	.5
Iowa	50	99	.5
South Dakota	35	67	.5
Nebraska	49	93	.5
North Carolina	50	100	.5
Arkansas	35	75	.4
Kansas	40	105	.4
Michigan	34	83	.4
Ohio	33	88	.4

Wisconsin	33	72	.4
Georgia	54	159	.3
Kentucky	38	120	.3
Missouri	34	115	.3
Tennessee	33	95	.3
Virginia	40	140	.3
Texas	31	254	.1

COMPARISON OF 53 MEMBER SENATE UNDER CHAPTER 3 AND BY RULE OF MAJOR FRACTIONS WITH NO MINIMUM GUARANTEE

	SENATE	NUMBER OF SEATS			
County	*% of Population X 53 =*	*on Whole No.*	*on Fraction*	*Total*	*Per Chapter 3*
Allegany	1.44	1		1	1
Anne Arundel	3.53	3	1	4	3
Baltimore	8.42	8		8	7
Baltimore City:					
District No. 1	2.16	2		2	2
District No. 2	2.84	2	1	3	2
District No. 3	2.91	2	1	3	2
District No. 4	2.72	2	1	3	2
District No. 5	2.78	2	1	3	2
District No. 6	2.63	2	1	3	2
Calvert	.27			—	1
Caroline	.33			—	1
Carroll	.90		1	1	1
Cecil	.83		1	1	1
Charles	.56		1	1	1
Dorchester	.51		1	1	1
Frederick	1.23	1		1	1
Garrett	.35			—	1
Harford	1.31	1		1	1
Howard	.62		1	1	1
Kent	.26			—	1
Montgomery	5.83	5	1	6	6
Prince George's	6.11	6		6	6
Queen Anne's	.28			—	1
St. Mary's	.67		1	1	1
Somerset	.34			—	1
Talbot	.37			—	1
Washington	1.56	1	1	2	1
Wicomico	.84		1	1	1
Worcester	.41			—	1
	53.01	38	15	53	

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1173

HARRY R. HUGHES AND JOHN-CLARENCE NORTH,
Petitioners,

v.

W. F. STRONG, ET AL.,
Respondents.

MOTION TO ADVANCE ORAL ARGUMENT AND TO DISPENSE WITH PRINTING OF THE RECORD

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MOTION TO ADVANCE ORAL ARGUMENT AND TO DISPENSE WITH PRINTING OF THE RECORD

Petitioners respectfully move for an Order, in the event Certiorari is granted

1. Advancing oral argument for hearing during the 1965 Term, and

2. Dispensing with the printing of the Record; and for reasons state:

1. The petition for a writ of certiorari in this matter was filed on April 1, 1966, less than thirty days after filing of the modified order and opinions below. Petitioners are advised that under this Court's calendar, if certiorari is granted, the case will not be reached for oral argument in ordinary course until the 1966 term.

2. The instant matter involves the constitutionality of the legislatively preferred plan for reapportionment of the Maryland Senate. The 1966 primary election in Maryland is scheduled for September 13, 1966. Md. Code (1965 Supp.), Art. 33, § 62(a). The candidates' filing deadline is midnight, July 5, 1966. Md. Code (1957 ed.), Art. 33, § 56. Should this Court conclude that the judgment of the Court of Appeals of Maryland should be reversed, the decision of this Court on the merits cannot be made effective for the 1966 elections in Maryland unless argument is accelerated.

3. Petitioners believe the instant matter can be fully and adequately briefed this Term. Counsel for Respondents have been intimately involved with reapportionment litigation for the last six years. The case has been fully briefed in both courts below. Both the parties and the courts below have expedited consideration of this matter at all of its stages. Argument was heard in the trial court barely three weeks after petitioners' intervention and before the Court of Appeals twelve days after the entry of the trial court's Decree.

4. No testimony was taken in the trial court. The record in the current proceedings consists only of the following:

1. The statutes involved
2. The opinions of the courts below
3. The report of a Maryland reapportionment study commission
4. Certain statistical tables.

Items 1 and 2 have been printed in full in Petitioners' Appendix. The relevant portion of item 3 is printed in Petitioners' Appendix. Most of the tables encompassed by item 4 are either printed in Petitioners' Appendix or

can be set forth in Respondents' Answer to the Petition. There would therefore seem to be no pressing need for the printing of a further record.

Respectfully submitted,

LAWRENCE F. RODOWSKY,
GEORGE W. LIEBMANN,
Counsel for Petitioners.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1173

HARRY R. HUGHES, ET AL., *Petitioners,*

v.

MARYLAND COMMITTEE FOR FAIR REPRESENTATION, ET AL., *Respondents.*

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

This brief in opposition to the petition for writ of *certiorari* is submitted in behalf of all the respondents, with the exception of Governor Tawes and the other Maryland election officials who were the original defendants in this extended litigation, now approaching the end of its sixth year in the courts.[1] They are the Maryland Committee for Fair Representation, an unincorporated association, and six individual citizens and eligible voters of Maryland, the plaintiffs who instituted the litigation on August 12, 1960. All are identified on the first page of the petition for *certiorari*. In the courts below the case was captioned "*Harry R. Hughes, et al.*, v. *Maryland Committee for Fair Repre-*

[1] The respondents for whom this brief speaks are usually referred to in it as "these respondents".

sentation, et al.," (P.A. 38).[2] For reasons which they fail to state, petitioners changed the caption on the petition filed in this Court. Respondents have observed the caption by which the case was identified in the proceedings below and under which, according to advice received from the Office of the Clerk, it has been docketed here.

Opinions Below

The majority and dissenting opinions of the Court of Appeals of Maryland are reported in 241 Md. 471, 217 A. 2d 273. Two prior opinions of that Court, rendered at earlier stages of this litigation, are reported in 228 Md. 412, 180 A. 2d 656, and 229 Md. 406, 184 A. 2d 715. The previous opinion of this Court in the case, issued on June 15, 1964, is reported in 377 U.S. 656.

Jurisdiction

Petitioners allege that this Court has jurisdiction by virtue of 28 U.S.C. 1257(3). These respondents, for reasons stated below, dispute that jurisdiction exists.

Questions Presented

Three questions are presented, one substantive, the others jurisdictional or procedural, in nature. They are:

1. Whether the requirements of the Equal Protection Clause of the Fourteenth Amendment of the Constitution are met by a state statute, which (a) apportions representation in the lower house of a bicameral legislature on a substantially equal population basis while guaranteeing each political subdivision of the state a minimum of one delegate therein, and, (b) apportions representation in the

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[2] References to the printed appendix filed with the petition for writ of *certiorari* are designated herein as "(P.A.)".

state senate on a basis which, while also guaranteeing each political subdivision a minimum of one senator, allows 37% of the state's population to elect a majority of the upper house, permits variances in the representation permitted as among the several political subdivisions which reach up to 6 to 1, with 25 out of a total of 29 political subdivisions assigned senatorial representation that varies more than 15% from an average senatorial district?

2. Whether this Court, upon a petition by persons who do not allege that any constitutional or federal rights are impaired by an existing and valid apportionment statute, should refuse to review as moot a decision of the highest court of a state holding a second apportionment statute to be unconstitutional under the Fourteenth Amendment, where the legislature provided that the second statute was to become effective and displace the first only if the highest court of the state had declared it to be valid, a contingency that did not occur?

3. Whether petitioners, who claim no private damage, allege no violations of federal constitutional rights, and have no responsibilities as state enforcement officials in vindicating the validity of a state apportionment statute, have standing in this Court to seek reversal of a state court's determination that the particular statute violated the federal constitution?

Statement

Petitioners' statement of the case, while accurate, is significantly incomplete. These respondents, therefore, state below additional pertinent facts which, for the most part, are not referred to in petitioners' statement.

1. *The History of the Litigation, August 12, 1960—June 15, 1964.* The opinions of both the trial court (P.A. 23-26) and of the Maryland Court of Appeals (P.A. 39-40) sum-

marize the history of the litigation prior to the decision of this Court rendered on June 15, 1964, in *Maryland Committee for Fair Representation* v. *Tawes,* 377 U.S. 656. A more detailed statement of that same history is set out in the majority opinion of this Court, 377 U.S., at 658-664.

2. *Legislative Action Following Remand.* After this Court's decision of June 15, 1964, the case was returned to the Court of Appeals of Maryland, which, on September 23, 1964, remanded it to the Circuit Court for Anne Arundel County, where the action originally began. The Court of Appeals directed the trial court to retain jurisdiction and to take affirmative action on the application of any of the parties in the event the Maryland legislature failed to enact a constitutionally valid state legislative apportionment act prior to the 1966 primary elections (P.A. 26).

The Maryland General Assembly did not pass any reapportionment legislation at its regular 1965 session. In the fall of 1965, respondent Governor Tawes convened a special session of the legislature for the purpose of enacting apportionment legislation which complied with the Fourteenth Amendment and satisfied the controlling mandate of this Court. The legislature passed two bills at the special session. The first, Ch. 2, Md. Laws, 1965 Spec. Sess., established a House of Delegates of 142 members, with each county and the six legislative districts of Baltimore City guaranteed one delegate each as a minimum. The remaining 113 delegates are apportioned among the political subdivisions on the mathematical formula of equal proportions (P.A. 13). Ch. 2 created a 43-member Senate to be elected on a population basis from 16 senatorial districts. Under this bill, 47.8% of the State's population would be required to elect a majority of 22 senators. In four instances, out of 29 districts, there are variances from the average population norm per district of slightly more than 15% (P.A. 32).

The 1965 Special Session of the General Assembly also passed a second reapportionment bill, Ch. 3, Md. Laws 1965, Spec. Sess. Ch. 3 reapportioned the House of Delegates on the same basis as permitted under Ch. 2. The second statute would create a State Senate of 53 members, with every county given one senator, with the exception of Anne Arundel, Baltimore, Montgomery, and Prince Georges counties, which are given, respectively, 3, 7, 6, and 6 senators each. The six legislative districts of Baltimore City are assigned two senators each by Ch. 3 (P.A. 6-9).

The legislative history of the two reapportionment acts passed at the 1965 special session of the Maryland General Assembly was marked by extended, and at times, extremely bitter debate.[3] Chapter 2 was enacted on October 22, 1965, the last day of the special session, just before Ch. 3 also was passed. Both bills passed the Senate by comfortable margins. Ch. 3, however, received only 77 votes in the House of Delegates, only 5 more than the required constitutional majority of the membership of 142. *Baltimore Morning Sun,* October 22, 1965, p. C24. Many legislators who voted for Ch. 3 stated their grave doubts concerning its constitutionality. *Washington Post,* October 22, 1965, p. B1. The bill was enacted in the face of the Attorney General's advice to the legislature that the bill was unconstitutional. *Baltimore Morning Sun,* October 20, 1965, p. C28.

The Governor signed both bills in order to avoid the acrimonious and extended floor fight which might have arisen at the outset of the regular 1966 session of the General Assembly if he had vetoed Ch. 3. *Baltimore Morning Sun,* October 27, 1965, p. C6; *Washington Evening Star,* October 28, 1965, p. C1. When signing the two bills in-

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[3] See, e.g., *Baltimore Morning Sun,* October 13, 1965, p. C26; *ibid,* October 14, 1965, p. A21; *Washington Evening Star,* October 16, 1965, p. A1; *Baltimore Evening Sun,* October 18, 1965, p. B24; *Baltimore Morning Sun,* October 19, 1965, p. C22; *ibid,* October 21, 1965, p. C20; *ibid,* October 22, 1965, p. 24; *Washington Post,* October 22, 1965, p. B1.

volved in this case, the Governor expressed his hope that there would be a prompt court decision on the constitutionality of Ch. 3. *Baltimore Morning Sun,* October 28, 1965, p. C20. Section 4 of Ch. 3 also expressed the legislative intention that the bill be submitted for a prompt "judicial determination" of its validity "by the Court of Appeals of Maryland" (P.A. 12).

3. *The Decisions Below.* In the trial court, these respondents, the original plaintiffs, admitted the constitutionality of Ch. 2, but challenged the constitutionality of Ch. 3 under the Fourteenth Amendment. The original defendants, through the Attorney General of Maryland, conceded the unconstitutionality of Ch. 3, but supported the constitutionality of Ch. 2. The petitioners in this Court, both members of the Maryland State Senate, were permitted to intervene for the purposes of arguing the constitutionality of Ch. 3 (P.A. 26). They did not challenge Ch. 2. The Chancellor found that Ch. 2 was constitutional, but that Ch. 3 violated the Equal Protection Clause and was not "constitutionally sustainable, as either an interim or permanent apportionment plan". (P.A. 32) While none of the parties before him had attacked the constitutionality of Ch. 2, the Chancellor went on to consider this issue and found that bill to be constitutional. (P.A. 33)

The intervenors appealed to the Maryland Court of Appeals. On January 11, 1966, the Court of Appeals issued a *per curiam* order (two judges dissenting) upholding the decision of the trial court. Formal majority and dissenting opinions were filed on March 2, 1966 (P.A. 38). Five of the seven judges of the Court of Appeals found that the numerous and substantial variations in representation which Ch. 3 would permit in the Maryland State Senate rendered it "constitutionally impermissible" (P.A. 47).

Like the Chancellor, the Court of Appeals then went on to pass upon and uphold the constitutionality of Ch. 2 (P.A. 51)

4. *Chapter 3.* This act, which was to have become effective on June 1, 1966, provided that by that time it shall have been "declared valid by the Court of Appeals of Maryland" (P.A. 12), when applied to the 1960 official census population figures for Maryland and the political subdivisions thereof shows the following: Of the 29 political subdivisions of Maryland, including the six legislative districts of Baltimore City, 20 would have variances of more than 30% from an average district in the new Senate created by Ch. 3. Senatorial districts created by the bill which fall within 15 percent of an ideal senate district based on population number 4. The discrepancies in the respective weight accorded the vote of citizens in the various political subdivisions reach ratios of exceeding 5 to 1 in a number of instances, more than 4½ to 1 in several others, 4 to 1 in others, and 3½ to 1 in others. Political subdivisions of the State containing 75 percent of the 1960 population are given only 64 percent of the representation to be provided in the new Senate. (P.A. 52). A majority of the State Senate could be elected by 37% of the State's population (P.A. 44). The substantial discrepancies which are permitted by Ch. 3 exist not only between the less populous as opposed to the populous counties, but are found also among the less populous counties themselves, reaching, for example, 3 to 1 in the case of Kent and Calvert County in relation to Wicomico County's senate representation (P.A. 29).

Current population estimates and projections, as compiled by the Maryland State Board of Health,[4] show that

[4] These statistics are found in Appendix 1 submitted to the trial court and printed with this brief.

most of the discrepancies which Ch. 3 would permit are even greater at the present time than those which result if the 1960 census statutes are used. For example, the population of Montgomery County each year increases by over 30,000, an amount greater than the 1960 populations of Calvert, Caroline, Dorchester, Kent, Queen Anne's and Somerset Counties. *Bethesda-Chevy Chase Tribune*, December 31, 1965, p. 1. By July 1, 1966, one month after Ch. 3 would have taken effect, four suburban counties and the City of Baltimore would contain approximately 80 percent of the population of Maryland, but would be entitled to only 64 percent of the Senate representation. By 1969, Montgomery County and Prince Georges County are expected to have a combined population of more than 1,136,000, or about 30 percent of the State's total. *Baltimore Morning Sun*, September 11, 1965, p. A10. Under Ch. 3, these two counties would receive only 23 percent of the Senate seats provided for therein.

If permitted to become effective, Ch. 3 would govern elections of the Maryland General Assembly to be conducted in 1966 and 1970 (P.A. 9). And until such time "as it is superseded by an amendment for that purpose to the Constitution of Maryland", Ch. 3 would establish the "membership of the Senate of Maryland . . .". (P.A. 10). If Ch. 3 does not become effective, Ch. 2 does, in such case becoming law on June 1, 1966. Ch. 2 has not been challenged in this litigation by any party hereto. Nor have any other proceedings been instituted to challenge its constitutionality.

Argument

Several compelling reasons argue against issuance of the writ. These are: (1) that the case was correctly decided in accord with this Court's rulings in *Reynolds* v. *Sims*, 377 U.S. 553, and related reapportionment decisions; (2)

that Maryland's custom of handling local governmental matters by public local legislation cannot serve as an excuse for dispensing with the requirements of Equal Protection, *Swann* v. *Adams*, 383 U.S. 210; (3) that the case is moot, *Muskrat* v. *United States*, 219 U.S. 346, 354; and (4) that petitioners lack standing in this Court to seek reversal of the decision below, *Doremus* v. *Board of Education*, 342 U.S. 429. Respondents state these reasons in more detail in the remaining sections of this brief.

A. *The Decision Below Was Correct.* In affirming the trial court, the Maryland Court of Appeals invoked and correctly applied this Court's landmark holding in the Alabama reapportionment case, *Reynolds* v. *Sims*, 377 U.S. 553. Its ruling was unequivocal:

> "We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, *an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State.*" [5] (Italics supplied throughout.)

The substantial disparities in Senate representation with which Ch. 3 abounds mock that holding. If there were questions of what is meant by a "substantial" dilution of a citizen's vote, the Court provided significant clues. First, in *Reynolds* v. *Sims, supra* when it said:

> "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representa-

[5] 377 U.S., at 568.

tive form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system. It could hardly be gainsaid that a constitutional claim had been asserted by an allegation that certain otherwise qualified voters had been entirely prohibited from voting for members of their state legislature. And, if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted. It would appear extraordinary to suggest that a State could be constitutionally permitted to enact a law providing that certain of the State's voters could vote two, five, or 10 times for their legislative representatives, while voters living elsewhere could vote only once. *And it is inconceivable that a state law to the effect that, in counting votes for legislators, the votes of citizens in one part of the State would be multiplied by two, five, or 10, while the votes of persons in another area would be counted only at face value, could be constitutionally sustainable. Of course, the effect of state legislative districting schemes which give the same number of representatives to unequal numbers of constituents is identical.* Overweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there. The resulting discrimination against those individual voters living in disfavored areas is not easily demonstrable mathematically. Their right to vote is simply not the same right to vote as that of those living in a favored part of the State. Two, five, or 10 of them must vote before the effect of their voting is equivalent to that of their favored neighbor. Weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable.

> One must be ever aware that the Constitution forbids "sophisticated as well as simple-minded modes of discrimination." *Lane* v. *Wilson,* 307 U.S. 268, 275; *Gomillion* v. *Lightfoot,* 364 U.S. 339, 342."[6]

Secondly, three cases decided by this Court on the same day as it ruled in *Reynolds* v. *Sims* and *Maryland Committee for Fair Representation* v. *Tawes, supra,* furnish further evidence of what the Court had in mind when it applied the Equal Protection Clause to "substantial" dilutions of the voting franchise. We refer to: the New York case, *WMCA* v. *Lomenzo,* 377 U.S. 633; the Virginia case, *Davis* v. *Mann,* 377 U.S. 678; and the Colorado case, *Lucas* v. *Colorado General Assembly,* 377 U.S. 713. In each of these three decisions, the Court struck down as unconstitutional schemes of representation in state legislatures where the ratios between the most over-represented and the most under-represented areas did not exceed 3½ to 1, somewhat less than those allowed under Ch. 3. For example, in the Virginia case, the Supreme Court affirmed the trial court's voiding of an apportionment statute under which the ratio between the most populous and least populous senatorial districts was 2.65 to 1, while the maximum discrepancy in house representation was 4.36 to 1. In the Colorado case, the most compelling of all because there, at least, the people of Colorado had approved the reapportionment plan in a state-wide referendum, the Court held invalid ratios of 3.6 to 1 in the senate and 1.7 to 1 in lower house representation. Moreover, it reached this result in the face of a holding by the trial court that the Colorado lower house was "apportioned as nearly on a population basis as was practicable. . . ." 377 U.S. 713, 727.

Finally, if any lingering skepticism persisted that population variations of 2 to 1 or more might somehow be per-

[6] 377 U.S., at 562-563.

missible, at least where one house of a state legislature was based on population, this Court's reversal of a lower court in the Michigan reapportionment case should have thoroughly exploded it. There, a three judge court had upheld provisions of the very new Michigan State Constitution, under which representation in the lower house was based on population, where 60% of the population could elect a majority of the Senate, and where the representation afforded in that chamber allowed disparities slightly in excess of 4 to 1. *Marshall* v. *Hare*, 277 F. Supp. 989 (E.D. Mich., 1964). The Court reversed, 378 U.S. 561, on the authority of *Reynolds* v. *Sims, supra,* and the other reapportionment decisions handed down on June 15, 1964.

Petitioners, however, attempt to avoid the controlling impact of the decisions discussed above by seizing upon and textually isolating dicta in *Reynolds* v. *Sims,* and then attempting to apply it so as to impair or circumscribe the basic holding of *Reynolds* and the related reapportionment decisions. It is true, as they argue, that in *Reynolds* this Court did say:

> "A consideration that appears to be of more substance in justifying *some* deviations from population-based representation in state legislatures is that of insuring *some* voice to political subdivisions, as political subdivisions. Several factors make more than insubstantial claims that a State can rationally consider according political subdivisions *some* independent representation in at least one body of the state legislature, *as long as the basic standard of equality of population among districts is maintained.* Local governmental entities are frequently charged with various responsibilities incident to the operation of state government. In many States much of the legislature's activity involves the enactment of so-called local legislation, directed only to the concerns of particular political subdivisions. And a State may legitimately desire to construct dis-

tricts along political subdivision lines to deter the possibilities of gerrymandering. *However, permitting deviations from population-based representation does not mean that each local governmental unit or political subdivision can be given separate representation, regardless of population.* Carried too far, a scheme of giving at least one seat in one house to each political subdivision (for example, to each county) could easily result, in many States, in a total subversion of the equal-population principle in that legislative body. This would be especially true in a State where the number of counties is large and many of them are sparsely populated, and the number of seats in the legislative body being apportioned does not significantly exceed the number of counties. Such a result, we conclude, would be constitutionally impermissible. *And careful judicial scrutiny must of course be given, in evaluating state apportionment schemes, to the character as well as the degree of deviations from a strict population basis.* But if, even as a result of a clearly rational state policy of according some legislative representation to political subdivisions, population is submerged as the controlling consideration in the apportionment of seats in the particular legislative body, then the right of all of the State's citizens to cast an effective and adequately weighted vote would be unconstitutionally impaired."[7]

The petition labors in an effort to show that Ch. 3 complies with the several requirements and restrictions referred to in the language quoted above, all of which must be present if *some* deviations in population-based representation are to be permitted in order to insure "*some* voice to political subdivisions. . . ." However, and perhaps understandably, petitioners omit entirely mention of the controlling standard which applies in all cases, i.e., that the "basic standard of equality among districts . . . [be main-

[7] 377 U.S., at 580-581.

tained]". 377 U.S., at 580. This Court, we believe, has made it very clear that no substantial departures from population-based representation in either house of a state legislature are permitted under the Equal Protection Clause of the Fourteenth Amendment. The standard is applicable even in those cases where other non-discriminatory factors, such as existence as a political subdivision, may be taken into *some* account. That is the way the trial court and Court of Appeals approached the question of the constitutionality of Ch. 3. In doing so, they adhered closely to the decision of this Court in *Reynolds* v. *Sims, supra,* and followed precisely the instructions it gave in *Roman* v. *Sincock,* 377 U.S. 695, 710, where it said:

> "Rather, the proper judicial approach is to ascertain *whether,* under the particular circumstances existing in the individual State whose legislative apportionment is at issue, *there has been a faithful adherence to a plan of population-based representation, with such minor deviations only* as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination."[8]

If the discrepancies which would be tolerated under Ch. 3 are only "minor deviations" from population-based representation, then black means white and *Reynolds* v. *Sims* and the several subsequent reapportionment cases decided in consistent fashion by this Court signify nothing. The Fourteenth Amendment cannot require one thing of Alabama, Virginia, New York, Colorado, and Michigan and yet not demand the same of Maryland and other states. The trial court and the Court of Appeals recognized that. Consequently, they decided the case correctly and in accord with the controlling precedents of this Court.

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[8] 377 U. S. 695, 710.

B. *A Custom of Local General Legislation Furnishes No Exemption From Its Requirement of Equal Protection.* The courts below rightly concluded that this Court will insist on observance of the basic and controlling standard of substantially equal population-based representation in *all* cases, even when permitting *some minor* deviations in order to assure *some* representation for political subdivisions. The controlling requirement cannot be waived or diluted on the ground, advanced by the petitioners, that in Maryland "counties are of great and perhaps unexcelled importance as administrative units", although not so great, apparently, as to relieve the Maryland General Assembly from the torrent of local legislation with which it is biennially confronted. Spencer, Contemporary Local Government in Maryland, (Univ. of Md., 1965), pp. 15-17. These respondents, among others, are hopeful that the reapportionment of the Maryland legislature on a representative basis will further spur the already discernible movement toward the extension of home rule for the various counties of the State. *Baltimore Morning Sun,* February 13, 1965, p. C7. Whether or not that hope is realized, however, is irrelevant to the issues in this case. Other states where counties have been traditionally recognized as important units of local government have been required to adjust to the overriding prerequisites of the Equal Protection Clause, so far as representation in their legislatures is concerned. Among them are: Kansas, *Harris* v. *Kansas,* 382 U.S. 894; California, *Silver* v. *Jordan,* 381 U.S. 415; and, most recently, Florida, *Swann* v. *Adams,* 383 U.S. 210, 86 S. Ct. 767. The State of Florida, like Maryland, follows "a custom of handling local governmental matters by . . . public-local legislation . . . rather than by public-general legislation or county home rule." Dixon, *Apportionment Standards and Judicial Power,* 38 Notre Dame Lawyer,

367, 391 (1963). Both States can continue to observe the custom; but its existence cannot serve as an excuse for excepting Maryland, any more than Florida, from the requirements of the Fourteenth Amendment. Indeed, an *a fortiori* case is presented by the case at bar. Unlike Florida's situation, considered by the Court in *Swann* v. *Adams, supra,* Maryland has enacted a constitutional reapportionment statute, i.e., Ch. 2, Md. Laws, Spec. Sess. (1965). Therefore, the Court is not presented with the Hobson's choice of either permitting elections for a state legislature to proceed under an unconstitutional statute or invalidating the statute with the attendant risk of chaotic, state-wide, at-large elections.

C. *The Case Is Moot.* Petitioners ask the Court to render an advisory opinion, in a moot case, on a federal constitutional issue which is not necessary for it to decide, and where this Court's decision in favor of constitutionality could, pursuant to a permitted construction of purely state law, be legitimately avoided upon remand by both the Maryland Court of Appeals and the General Assembly. These jurisdictional infirmities, as discussed below, strongly argue that grant of the writ of *certiorari* in this case would be improvident.

In enacting Ch. 3 the Maryland General Assembly provided that it was to become effective upon the condition that it "shall be declared valid by the Court of Appeals of Maryland, . . ." (P.A. 12). The condition precedent which the legislature prescribed was one reflecting its concern that the reapportionment picture be promptly clarified; it was a reasonable legislative condition and within its power to make. No question concerning it was or could have been successfully raised below. 82 C.J.S. 978. The statutory contingency, however, did not occur. *Gibson* v. *State,* 204 Md. 423, 104 A. 2d. 800, 805. As a consequence, a prior, and

constitutional, statute, Ch. 2, becomes the law of Maryland on June 1, 1966. Accordingly, the federal constitutional issue arising in this litigation is foreclosed from further consideration. When the Court of Appeals of Maryland held Ch. 3 to be invalid, the statutory condition was not met, and the case became moot. *KFAB Broadcasting Co.* v. *Sorensen*, 290 U.S. 599, 600; *Mills* v. *Green*, 159 U.S. 651, 653; 6 Moore's Federal Practice 3074. Any controversy which existed between these respondents and the State of Maryland, either acting through its election officials or through volunteer intervenors, was extinguished by that decision. *Mine Safety Co.* v. *Forrestal*, 326 U.S. 371, 373, n. 3; Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States, (1951), p. 495. It cannot be revived and pursued in this Court, especially by the petitioners, who are not state officials entrusted with a duty to enforce the statute, and who can allege no private damage or violation of their own federal constitutional rights as a basis on which to invoke the Court's jurisdiction.

Respondents' contention that the case is now moot may, perhaps, arise upon an unusual set of facts. Still, the argument does not lack supporting analogies among the precedents of this Court. For instance, it has been held that a controversy usually ends if a statute which is the basis for an action is repealed. *United States* v. *Alaska S.S. Co.*, 253 U.S. 133, 116; Stern & Gressman, Supreme Court Practice (1962), p. 434, and cases cited. The case at bar presents a slightly different fact situation, but, we believe, calls for the same result. Here, the statute which is the basis for the action brought never became effective, since an express statutory condition precedent to its becoming law was not satisfied.

It is indisputable, of course, that this Court does not render advisory opinions. *Muskrat* v. *United States*, 219

U.S. 346, 354. *Liner* v. *Jafco, Inc.*, 375 U.S. 301, 306. A judgment of this Court "must be the final and conclusive determination of the rights of the parties, subject to no revision by other departments of government". *Robertson & Kirkham, supra,* at 469. These restrictions on the appellate jurisdiction of the Court are further buttressed by its own self-imposed limitation when constitutional issues are pressed upon it for decision. These the Court will not pass upon "unless absolutely necessary to a decision of the case . . .". *Ashwander* v. *T.V.A.*, 297 U.S. 288, 346-348; *Rescue Army* v. *Municipal Court,* 331 U.S. 549.

The petition cannot survive application of the rules which protect against improvident or unfruitful exercise of the Court's appellate jurisdiction. The Maryland legislature elected to constitute the Court of Appeals of Maryland as the tribunal upon whose declaration of validity Ch. 3 would become effective. The General Assembly could have been less restrictive in the statutory condition which it established. It might have made the statutory contingency dependent, for example, upon a final declaration of validity by this Court, or as the New York legislature provided, upon a declaration by "a court of competent jurisdiction". *WMCA, Inc.* v. *Lomenzo,* 238 F. Supp. 916, 920 (S.D. N.Y., 1965), affirmed *Travia* v. *Lomenzo,* 381 U.S. 431; and see the discussion in McKay, Reapportionment (1965), p. 387. The Maryland legislature chose to designate the Court of Appeals as the court whose decision *in favor* of the validity of Ch. 3 would trigger its effectiveness. It is true that the statutory condition imposed by the General Assembly would not have operated to bar review in this Court had the Court of Appeals upheld the constitutionality of Ch. 3 against the timely contentions of persons possessing them that the statute violated rights guaranteed by the federal constitution. *Nickel* v. *Cole,* 256 U.S. 222, 225. In such case,

there would be present the required adverse impact on federal constitutional rights. That indispensable element does not exist in the case which the petitioners seek to bring here. In effect, petitioners ask the Court to render an advisory opinion, telling the Court of Appeals of Maryland that it should have declared Ch. 3 valid and thus have permitted that statute to become effective, even though the Maryland General Assembly, in the lawful exercise of its legislative powers, did not elect to have the effectiveness thereof depend upon this Court's declaration of the statute's validity.

Further, even assuming *arguendo,* that the petitioners were right and that the Court of Appeals misapplied the Fourteenth Amendment, what consequences might ensue should this Court reverse? Too plainly for argument, on remand of the case to the Court of Appeals, the latter, purely as a matter of Maryland law, still could construe § 4 of Ch. 3 to require the conclusion that the statute had not become effective, thus precluding further defense of its constitutionality by State officials, because an indispensable condition precedent thereto had not been satisfied, i.e., that Ch. 3 had not been declared valid by the court to which the legislature had delegated the authority to make such an affirmative determination. *Columbus & Greenville Ry. Co.* v. *Miller,* 283 U.S. 96, 99; *Stewart* v. *Kansas City,* 239 U.S. 14, 16. If that is true, then it follows that the Court of Appeals could legitimately avoid the mandate of this Court by attributing to Ch. 3 under purely state law, an interpretation permitted, if not expressly called for, by the words of the statute itself, and not impaired by a ruling of this Court, even one which reversed the Court of Appeals on the federal constitutional question. The judgment of the highest court of a state that a case has become moot will be respected by this Court as one resting on an ade-

quate non-federal ground, unless that judgment represents an untenable attempt to evade decisions on federal questions. *Love* v. *Griffith*, 266 U.S. 32, 34; *Robertson & Kirkham, supra*, at 189. Moreover, the General Assembly of Maryland also is, and would remain, free, even in the event of a subsequent reversal by this Court to proceed on the assumption, again purely as a matter of state law, that Ch. 3 failed to satisfy the statutory contingency which it had expressly provided for in the act, and to recognize Ch. 2 as the only valid reapportionment statute in effect in Maryland as of June 1, 1966.

D. *Petitioners Lack Standing.* Even if the federal issue had not been mooted, as argued above, it is not one which the petitioners have standing to pursue in this Court. Whatever standing they may have been accorded under Maryland law as intervenors in the State court proceedings to defend the constitutionality of Ch. 3, such status does not automatically carry over to sustain their right to invoke the jurisdiction of this Court. In the federal sphere "a litigant may only assert his own constitutional rights or immunities". *United States* v. *Raines*, 362 U.S. 17, 22; *McGowan* v. *Maryland*, 366 U.S. 421, 429. And the Supreme Court remains free to test the standing of those who invoke its jurisdiction against the constitutional prerequisites that a "case or controversy" must exist as the basis for the exercise of that jurisdiction. *Doremus* v. *Board of Education*, 342 U.S. 429, 433; *Columbus & Greenville Ry. Co.* v. *Miller*, 283 U.S. 96, 99-100. Petitioners fail that test.

The rule has been consistently applied, for example, to deny the standing of a state official to attack the validity, under the federal constitution, of a state statute with the enforcement of which he is charged. *Smith* v. *Indiana*, 191 U.S. 138; *Braxton Co. Court* v. *West Virginia*, 208 U.S. 192; and see Hart & Wechsler, The Federal Courts and the

Federal System (1953), p. 162. Thus, the petitioners, and the original defendants, the State election officials, as well, would have lacked standing to challenge the constitutionality of Ch. 3 in this Court, had the decision below gone the other way. *Coleman* v. *Miller*, 307 U.S. 433, 466 (dissenting opinion of Mr. Justice Frankfurter).

However, the same result should obtain in the instant case, where the petitioners who seek to defend the constitutionality of a statute also can allege no private damage, nor claim any adversely affected official law-enforcement interest upon which to rest their standing to raise a federal constitutional issue. There is no question but that "innumerable cases recognize the standing of an administrative or executive official to defend the constitutionality of the legislation which he is charged with administering or enforcing". Hart & Wechsler, *supra*, at 162; see, e.g., *Boynton* v. *Hutchinson Gas Company*, 291 U.S. 656.[9] The standing which this Court accepts in such cases is based upon the "legally recognized duty [of an official] to enforce a statute which he is charged with enforcing", but whose validity has been drawn into question. *Coleman* v. *Miller*, *supra*, at 445 and 466. The petitioners, however, possess no such recognized official interest existing by virtue of a "duty to enforce the state's statute . . . the validity of which has been drawn in question". They are "merely the self-constituted spokesmen of a constitutional point of view . . .". *Id.*, at 467. Nor do they have any personal interest in the litigation, resting on any contention that they, or any persons similarly situated, have suffered pri-

[9] In this case, however, it is doubtful that even the original defendants, the state election officials, would have possessed standing to challenge the adverse opinion of the Maryland Court of Appeals here. As argued in the prior section of this brief, § 4 of Ch. 3 would have precluded their right to maintain such a challenge, since their official interest in enforcing the statute was extinguished under Maryland law by the Court of Appeals' failure to declare the statute effective.

vate damage or have been denied federal constitutional rights for which they seek vindication in this Court. Having been permitted, under state law, to defend the constitutionality of Ch. 3 in the courts of Maryland, petitioners "should be content to abide by their decision". *Smith* v. *Indiana,* 191 U.S. 138, 149. In any event, they cannot demonstrate any private or official stake in the outcome sufficient to confer standing on them in this Court.

The petitioners' lack of standing, therefore, furnishes a second jurisdictional ground for denying the writ of *certiorari.*

Conclusion

For the reasons stated herein, these respondents urge that the petition for writ of *certiorari* be denied.

Respectfully submitted,

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May 2, 1966

APPENDIX 1

Maryland Population Estimate for July 1, 1964, Provisional Estimates for January 1, 1965 and July 1, 1965, and Projections for January 1, 1966—July 1, 1969 by Political Subdivision

	July 1, 1964	Jan. 1, 1965	July 1, 1965	Jan. 1, 1966	July 1, 1966	Jan. 1, 1967	July 1, 1967	Jan. 1, 1968	July 1, 1968	Jan. 1, 1969	July 1, 1969
Maryland State	3,465,640	3,506,930	3,548,320	3,590,180	3,632,090	3,674,540	3,716,960	3,759,930	3,802,950	3,846,520	3,890,080
Baltimore City	922,270	921,700	921,150	920,550	920,000	920,000	920,000	921,000	922,000	923,000	924,000
Total Counties	2,543,370	2,585,230	2,627,170	2,669,630	2,712,090	2,754,540	2,796,960	2,838,930	2,880,950	2,923,520	2,966,080
Allegany	87,750	88,030	88,300	88,570	88,850	89,110	89,360	89,590	89,810	90,030	90,260
Anne Arundel	248,940	253,650	258,360	263,120	267,880	272,650	277,410	282,130	286,860	291,630	296,410
Baltimore	541,610	546,310	551,020	555,770	560,520	565,190	569,870	574,390	578,910	583,470	588,040
Calvert	17,360	17,510	17,660	17,810	17,960	18,110	18,270	18,410	18,560	18,710	18,860
Caroline	19,760	19,750	19,750	19,750	19,740	19,730	19,720	19,700	19,680	19,670	19,650
Carroll	57,240	57,710	58,180	58,650	59,120	59,590	60,050	60,490	60,940	61,390	61,830
Cecil	56,530	57,430	58,340	59,250	60,170	61,090	62,000	62,900	63,800	64,720	65,640
Charles	36,930	37,400	37,870	38,350	38,830	39,310	39,780	40,250	40,730	41,210	41,690
Dorchester	31,300	31,450	31,610	31,770	31,920	32,070	32,210	32,350	32,480	32,610	32,750
Frederick	82,860	84,030	85,190	86,360	87,530	88,690	89,850	90,990	92,130	93,270	94,420
Garrett	22,460	22,670	22,890	23,110	23,340	23,550	23,770	23,980	24,190	24,400	24,610
Harford	92,920	94,740	96,560	98,390	100,230	102,090	103,940	105,780	107,620	109,490	111,350
Howard	46,900	48,110	49,330	50,570	51,800	53,030	54,260	55,490	56,710	57,950	59,190
Kent	16,410	16,500	16,590	16,690	16,780	16,870	16,950	17,030	17,120	17,210	17,300
Montgomery	414,330	422,350	430,370	438,480	446,590	454,670	462,760	470,770	478,780	486,870	494,960
Prince Georges	485,800	500,940	516,080	531,490	546,900	562,470	578,040	593,670	609,301	625,210	741,120
Queen Annes	17,560	17,650	17,750	17,850	17,940	18,030	18,130	18,210	18,300	18,390	18,470
Saint Marys	44,380	44,970	45,570	46,170	46,780	47,390	48,000	48,610	49,210	49,830	50,450
Somerset	20,140	20,150	20,170	20,190	20,200	20,210	20,220	20,220	20,220	20,230	20,230
Talbot	23,090	23,230	23,380	23,530	23,680	23,830	23,980	24,110	24,250	24,390	24,520
Washington	100,500	101,490	102,480	103,470	104,470	105,450	106,440	107,390	108,340	109,300	110,260
Wicomico	53,260	53,690	54,120	54,560	55,000	55,430	55,850	56,260	56,670	57,090	57,500
Worcester	25,340	25,470	25,600	25,730	25,860	25,980	26,100	26,210	26,330	26,450	26,570

Maryland State Department of Health, Division of Statistical Research and Records 9/2/65.